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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 659

LAWRENCE LANDRY, ROMMELL MULLER, JOSEPH H. REYNOLDS, DAVID A. REYNOLDS, JAMES WASHINGTON, FRANK DITTO, ROBERT LUCAS, ROBERT BROWN, MICHAEL ROGERS, BERNARD HUGHES, ARNOLD FORD, VISSA MARIE TURNER, WYSINGO TURNER, ANDREW BROWN, CHARLES FLETCHER, JAMES JONES, HERMAN TOWNSEND, JEROME PARKER, RUDY HOOPER, and ACT, an unincorporated association,

Appellants,

vs.

JOHN S. BOYLE, Chief Judge of the Circuit Court of Cook County, Illinois; JOHN J. STAMOS, State's Attorney of Cook County, Illinois; JOSEPH I. WOODS, Sheriff of Cook County, Illinois; MAURICE W. LEE and JOHN S. LIMPERIS, Magistrate of the Circuit Court of Cook County, Illinois,

Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JURISDICTIONAL STATEMENT

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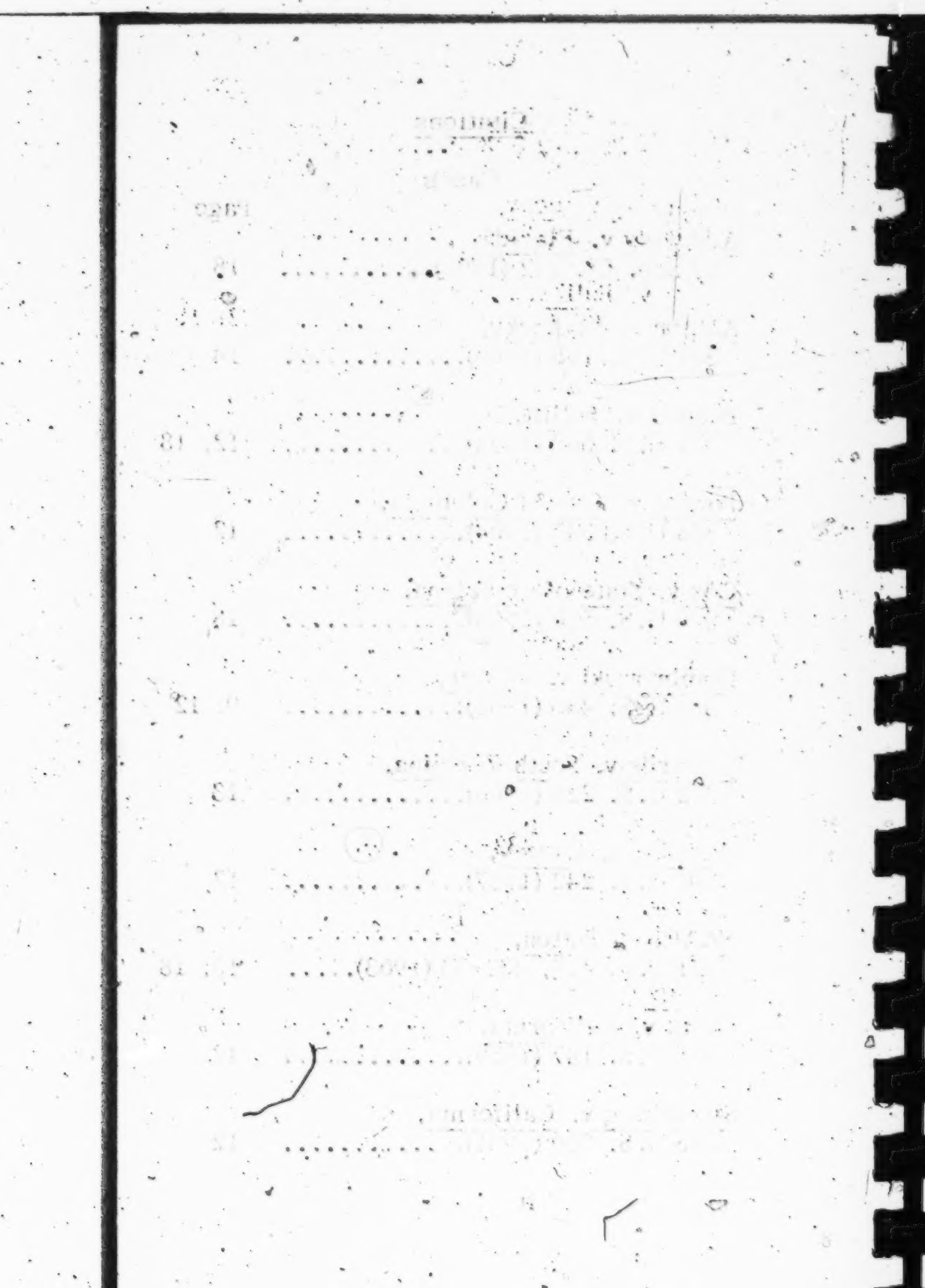

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1968

No.

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Appellants,

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Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

JURISDICTIONAL STATEMENT

Appellants, plaintiffs in the court below, appeal from a portion of the Judgment of a Three Judge Court, in the United States District Court for the Northern District of Illinois, Eastern Division, entered pursuant to Memorandum Opinion, on March 1, 1968, which Judgment, inter alia, denied injunctive relief, and declared the constitutional validity of certain provisions of the Illinois Criminal Code of 1961, as amended, namely, Illinois Revised Statutes, Ch. 38, § 25-1 (a)(1)(3), 1967, which statute purports to proscribe the penal offence of mob action; Illinois Revised Statutes, Ch. 38, § 31-1, which statute purports to proscribe the penal offence of resisting or obstructing a peace officer; and Illinois Revised Statutes, Ch. 38, § 12-6(a)(1)(2)(4)(5)(6)(7), 1967, which statute purports to proscribe the penal offence of intimidation. This appeal is prosecuted by LAWRENCE LANDRY, ROMMELL MULLER, JOSEPH H. REYNOLDS, DAVID A. REYNOLDS, JAMES WASHINGTON, FRANK DITTO, ROBERT LUCAS, ROBERT BROWN, MICHAEL ROGERS, BERNARD HUGHES, ARNOLD FORD, VISSA MARIE TURNER, WYSINGO TURNER, ANDREW BROWN, CHARLES FLETCHER, JAMES JONES, HERMAN TOWNSEND, JEROME PARKER, RUDY HOOPER, and ACT, an unincorporated association, plaintiffs below, and appellants herein, to review

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that portion of the said Judgment of the United States District Court for the Northern District of Illinois which declared the foregoing statutes to be constitutionally valid. These appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The Opinion of the Three Judge Court of the Northern District of Illinois, Eastern Division, is reported in 280 F. Supp. 938. Copies of the Judgment Order, Opinion of the Three Judge Court, and appellants' Notice of Cross Appeal, are attached hereto as Appendix A. On December 28, 1967, one of the Judges of the United States District Court for the Northern District of Illinois, Eastern Division, overruled the motion of the defendants below, appellees herein, to dismiss the proceeding, and the Opinion of the court dealing with the Motion to Dismiss, is reported in 280 F. Supp. 929. For the convenience of the Court, the Complaint, Motion to Dismiss, the Answer of the plaintiffs below to the defendant's Motion to Dismiss, the Opinion of the Court entered on December 28, 1967, and the defendants' Answer to the Complaint are attached hereto as Appendix B.

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United States District Court for the
Northern District of Illinois which declared
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OPINION BELOW

The Opinion of the Three Judge Court of the Northern District of Illinois, Eastern Division, is reported in 280 F. Supp. 933. Copies of the Judgment Order, Opinion of the Three Judge Court, and Appellants Notice of Cross Appeal, are attached hereto as Appendix A. On December 23, 1967, one of the Judges of the United States District Court for the Northern District of Illinois, Eastern Division, overruled the motions of the defendants below, appellees herein, to dismiss the proceeding, and the Opinion of the Court dealing with the Motion to Dismiss, is reported in 280 F. Supp. 929. For the convenience of the Court, the Complaint, Motion to Dismiss, the Answer of the plaintiffs below to the defendant's Motion to Dismiss, the Opinion of the Court, dated December 23, 1967, and the defendants' Answer to the Complaint are attached hereto as Appendix B.

JURISDICTION

This suit was brought by these appellants, plaintiffs below, under Title 28, U.S.C., §§ 1331, 1332, 1343(3) and (4), 2201, 2202, 2281, 2284; 42 U.S.C., §§ 1981, 1983 and 1985; and the Constitution of the United States and more particularly the First, Fourth, Fifth, Sixth, Eighth, Tenth, Thirteenth, Fourteenth and Fifteenth Amendments thereto. The suit was prosecuted to challenge the constitutional validity of numerous sections of the Illinois Criminal Code of 1961 as amended, namely: Ch. 38, §§ 25-1(a)(1) and (2), which proscribes mob action; Ch. 38, § 31-1, which relates to the offence of resisting arrest; Ch. 38, §§ 12-2, 12-4 and 12-6, which proscribe aggravated assault and aggravated battery and intimidation, respectively. The complaint also questioned the constitutional validity of these statutes as they were being applied to the plaintiffs. The Opinion and a Judgment Order of the Three Judge Court were entered on March 1, 1968.

On April 2, 1968, the court below entered its Decree for permanent injunction in support of that portion of its Judgment which declared Subsections (a)(3) of Ch. 38, § 12-6, the Intimidation Statute, unconstitutional. On April 3, 1968, defendants below, and appellees herein, filed their Notice of Appeal seeking to review that portion of the Judgment in this Court. On April 5, 1968, the plaintiffs

proceedings, still pending in the trial court, these questions could not be timely developed for inclusion in this record on review.

Further, because of the pressures of this and other litigation for which counsel for these appellants are responsible, these very substantial questions could not have been developed within the prescribed time for purpose of inclusion in this Jurisdictional Statment. Accordingly, it was finally determined by counsel for appellants to file herein appellants' Jurisductional Statement, limited to the trial court's treatment of the question of the constitutional validity, on their face, of the Illinois Statutes involved in this case.

These appellants have filed their Motion to Affirm a portion of the Judgment appealed from in cause No. 244. The failure to timely file this Jurisdictional Statement was not due to culpable neglect. No harm or injury will be caused to the rights of any of the parties, and substantial justice will be done if this Court should see fit to excuse the delay.

Accordingly, it is respectfully requested that the late filing of this Jurisdictional Statement be excused

REQUEST THAT LATE FILING BE EXCUSED

Counsel for appellants herein, plaintiffs below, acknowledge that as a result of an erroneous interpretation of the Rules of this Court; and through inadvertence and mistake, combined with the pressures of this and other litigation, this Jurisdictional Statement was not filed in this Court within 90 days from the entry of the Judgment below.

It was always the intent of these appellants to perfect their appeal to review all substantial appealable questions arising out of the proceedings below, as evidenced by the filing by these appellants of their Notice of Cross Appeal and their stipulation as tothe record in this cause.

However, subsequent to the entry of the Judgment appealed from, proceedings in this matter were not terminated in the District Court. Rather, further proceedings were had and are still being conducted with respect to various aspects of the case; resulting in the raising of several substantial procedural and substantive questions. It is submitted that these questions involve the federal anti-injunction statute. Title 28, U.S.C., sec. 2283, as well as the application of the doctrine of abstention to proceedings instituted under the provisions of Title 42, U.S.C., sec. 1983. In the present posture of

below, appellants herein, filed their Notice of Cross Appeal to this Court to review that portion of the Judgment which declared the following statutes to be valid: Illinois Revised Statutes, Ch. 38, § 25-1(a)(1) and (3), which proscribes mob action; Illinois Revised Statutes, Ch. 38, § 31-1, which relates to the offence of resisting arrest; and Illinois Revised Statutes, Ch. 38, § 12-6(a)(1)(2)( )(5)(6)(7), which proscribes the criminal offence of intimidation.

The jurisdiction of the Supreme Court of the United States to review the decision by direct appeal is conferred by Title 28, U.S.C., §§ 1253 and 2281. The following decisions of this Court also sustain jurisdiction to review the Judgment on direct appeal in this case: Zwickler v. Koota, 389 U.S. 241; Dombrowski v. Pfister, 380 U.S. 480; Baggett v. Bullitt, 377 U.S. 360.

QUESTIONS PRESENTED

The question presented by this appeal is whether the Judgment of the Court below upholding the constitutional validity of the statutes in question must be reversed in light of the criteria set forth in Dombrowski v. Pfister, 380 U.S. 480 (1964); Zwickler v. Koota, 389 U.S. 241 (1967), since the said statutes are both vague and overbroad, and impinge in a prohibited manner upon the lawful exercise by appellants of rights

guaranteed to them by the provisions of the First and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

The parties to this proceeding have heretofore, through their respective attorneys, filed their stipulated designation of the Record in the companion proceeding filed in this Court, and arising out of the same cause of action below, which cause of action is entitled JOHN S. BOYLE, etc., et al. v. LAWRENCE LANDRY, et al., and docketed in this Court as appeal cause No. 244. Appellants herein respectfully request that the said stipulated designation of the Record, and the Record filed in appeal cause No. 244, be allowed to stand as the designation of the Record and the Record in this companion proceeding.

On October 26, 1967, the individual appellants herein, all being Negro citizens of the United States, and the State of Illinois residing in the City of Chicago, Cook County; and ACT, an unincorporated association, with offices in the City of Chicago, State of Illinois, filed their complaint in the United States District Court for the Northern District of Illinois, Eastern Division, against numerous officials of the City of Chicago and the County of Cook, State of Illinois. Appellants, as a class, on behalf of themselves and all persons

similarly situated, challenged the constitutionality of certain sections of the Illinois Criminal Code of 1961, as amended, requested the convening of a Three Judge Court prusuant to Title 28, U.S.C., §§ 2281 and 2284, and prayed for a temporary and permanent injunction to restrain the defendants from the enforcement and prosecution of the enumerated statutes of the State of Illinois. Certain of the appellants were persons who had been arrested and charged with violations of several of the challenged statutes prior to the filing of the complaint, and were persons whose prosecutions where then pending in the state courts of Illinois. The complaint alleged that the provisions of the challenged statutes were void and illegal on their face and as applied to the appellants. Appellants alleged, inter alia, that the impact of the application of the challenged statutes, and the unconstitutional prosecutions complained of had the effect of deterring the Negro community in particular, and their friends and supporters from engaging in lawful protest activities against racial injustice, which activity is constitutionally protected. Plaintiffs asserted the fear of becoming victims of the unconstitutional and discriminatory laws and selective law enforcement and prosecution program conducted by the appellees, defendants below; and that the appellees' conduct further had the effect of creating a chill upon the exercise of appellants'

rights under the First and Fourteenth Amendments of the Constitution of the United States.

The appellees' motions to dismiss for want of jurisdiction and for alleged failure of the complaint to state a claim was denied. A Three Judge Court was inpaneled to consider the constitutionality of the challenged state statutes, and the issue of the alleged unconstitutional application of the state statutes was held in abeyance pending a determination of the threshold question of facial constitutionality. The appellees agreed informally that all pending criminal prosecutions in the state courts involving the named appellants for acts allegedly committed prior to the filing of the complaint would be held in status quo; accordingly, there was no ruling made with respect to the motion of the appellants herein for temporary injunctive relief. Appellees filed their answer denying the material allegations of the complaint and affirmatively asserting alleged grounds for federal abstention as well as the provisions of Title 28, U.S.C., § 2283, as reasons for denying injunctive relief.

On March 1, 1968, the Three Judge Court rendered its Opinion declaring the provisions of Illinois Revised Statutes, Ch. 38, § 25-1(a)(2) and Ch. 38, § 12-6 (a)(3), to be unconstitutional. The remaining provisions of the aforesaid statutes, and

rights under the First and Fourteenth Amendments of the Constitution of the United States.

The appellees' motions to dismiss for want of jurisdiction and for affirmance in the complaint to state a claim was denied. A three judge Court was impaneled to consider the constitutionality of the challenged statutes, and the issue of the allegedly unconstitutional application of the statutes was tried to the Court pending a determination of the threshold question of moot controversy. The appellees argued formally that all pending criminal prosecutions in the state courts involving the appellants had been terminated, prior to the filing of the complaint, and that the appellants would be held in status quo accordingly. There was no ruling made on this representation of the appellants' motion for temporary injunctive relief. A three judge district court denying the motion for preliminary injunction and permanently restraining enforcement as well as the provisions of Ohio Rev. C., § 2283, as to cases for declaring injunctive relief.

On March 1, 1968, the Three Judge Court rendered its Opinion declaring the provisions of Illinois Revised Statutes, Ch. 38, § 25-1(a)(2) and Ch. 38, § 12-6(a)(3), to be unconstitutional. The remaining provisions of the aforesaid statute, and

all other statutes challenged by the appellants were declared by the court to be valid. It is the latter portion of that Judgment from which this appeal has been taken.

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

Constitutional democrary in the United States of America stands today at a crossroads. It is quite appropriate to ask today, whether dissent, particularly legitimate public protest by minority groups against the commission of civil wrongs by officials under the color of law will be tolerated at all. Regretably, in many quarters, law has become the device by which legitimate public protest and dissent shall be stifled. This case, brought by members of an ethnic minority in the United States District Court for the Northern District of Illinois, Eastern Division, admittedly challenges certain laws of the State of Illinois which appellants believe to have been adopted for the primary purpose of stifling dissent and suppressing legitimate public protest by black people and their supporters against racial injustice.

It is respectfully urged here that not only is the federal question presented substantial, it is crucial; for in today's climate, it seems quite apparent as this Court enunciated in Dombrowski v. Pfister, 380 U.S.

It is respectfully urged here that not only is the federal question presented substantial, it is crucial; for in today's climate, it seems quite apparent as this Court enunciated in Gomillion v. Lightfoot, 364 U.S.

480 (1965) that the federal courts must act to protect the First Amendment rights of citizens from infringements of vague and overbroad state statutes. For this reason, and for others hereinafter set forth, this Court should note jurisdiction and deal with the issues raised herein on the merits on briefs and oral argument.

Speaking first to the Illinois Mob Action Statute, Illinois Revised Statutes, Ch. 38, § 25-1(a)(1)(3), it is patently repugnant to the guarantee of free expression and assembly. Subsection (2) of this same statute was declared unconstitutional by the court below, and no contest is being made by the parties with respect to that determination which was a part of the court's judgment of March 1, 1968. The challenged provisions of the Illinois Mob Action Statute are set forth in full below:

The Mob Action Statute

Ill. Rev. Stats., Ch. 38, § 25-1

"(a) Mob action consists of any of the following:

(1) the use of force or violence disturbing the public peace by two or more persons acting together and without authority of law; or

* * *

(3) the assembly of two or more persons, without authority of law, for the purpose of doing violence to the person or property of any one supposed to have been guilty of a violation of the law, or for the purpose of exercising correctional powers or regulative powers over any person by violence.

(b) Any person engaged in mob action shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed thirty days, or both.

(c) Any participant in a mob action which shall by violence inflict injury to the person or property of another shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or in the penitentiary from one to five years, or both fined and imprisoned.

(d) Any participant in a mob action who does not withdraw on being commended to do so by any peace officer shall be fined not to exceed $500 or imprisoned in a penal

institution other than the penitentiary not to exceed one year, or both."

We submit that there is no way to read the remaining foregoing portions of the statute so as to determine exactly what activity or conduct is actually prohibited. Indeed, it would appear that the statute is deliberately vague and overbroad. The statute fails to meet the most minimal standards of the First and Fourteenth Amendments. Zwickler v. Koota, 389 U.S. 241 (1967); Dombrowski v. Pfister, 380 U.S. 479 (1965); Baggett v. Bullitt, 377 U.S. 360 (1964); Bowlee v. City of Columbia, 378 U.S. 347 (1964); Wright v. Georgia, 373 U.S. 284 (1963); NAACP v. Button, 371 U.S. 415 (1963); Smith v. California, 361 U.S. 147 (1959); Winters v. New York, 333 U.S. 507, 509-510, 517-18 (1948); Herndon v. Lowry, 301 U.S. 242 (1937); Stromberg v. California, 283 U.S. 359 (1931; United States v. CIO, 335 U.S. 106 (1948).

Illinois Revised Statutes, Ch. 38, § 31-1, proscribes the offence of resisting or obstructing a peace officer. This statute is set forth below in full.

Resisting or Obstructing a Peace Officer.

"A person who knowingly resists or obstructs the performance of one known

to the person to be a peace officer or any authorized act within his official capacity shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year or both."

In this statute, the State of Illinois truly exceeds the presumption of validity oridinarily enjoyed by state statutes. The statute expressly states that a peace officer may lawfully engage in "...any authorized act within his official capacity...," irrespective of whether "his authorized act" impinges upon or may in fact prevent constitutionally protected speech and assembly.

Here then is, in bold presence, that state regulation truly calculated to deny that "breathing room" required for the survival of First Amendment freedoms. NAACP v. Button, 371 U.S. 415, 432, 433 (1963); Edwards v. South Carolina, 372 U.S. 229 (1963). This Court has always held that states may not engage in the lawless enforcement of the law. The use of the language "...authorized act within his official capacity..." does not on its face add lawfulness to the act or conduct of the peace officer. Nor is the "act" which the peace officer may perform narrowly or otherwise defined by statute. On the contrary, the statute imposes sanctions upon the resistance of any act performed by the police officer. Certainly, nothing could impose a greater chill upon the exercise of First

Amendment freedoms than this particular statute. The statute should have been struck down by the court below for its overbreath; for it would be difficult to find a situation where the freedom and liberty of the citizen is more clearly left to the discretion of the peace officer. Whitehall v. Elkins, 88 Sup. Ct. 184 (1967); Ashton v. Kentucky, 384 U.S. 195 (1966). Under the language of this statute, the pleace officer need only decree on the spot that the most peaceful and lawful assembly, no matter how innocuous, be broken up. Any failure on the part of the citizen to do so immediately subjects him to the pain and penalties of the statute.

Here again the objectives of free speech, assembly and legitimate public protest, and the objectives of proper law enforcement converge. To suggest that society will never know the day when this problem will be permanently resolved, is to state that the question is most substantial. The survival of America and of democracy requires that the search for solution continue in this Court. The parties and the problem must not be returned to the street corner without the further aid of this Court. For this very vital reason, jurisdiction should be noted.

The Illinois Intimidation Statute, Illinois Revised Statutes, Ch. 38, § 12-6 is even more vulnerable to constitutional attack.

Subsection (a)(3), of this statute was declared unconstitutional by the United States District Court for the Northern District of Illinois, Eastern Division. This precise portion of the trial court's Judgment is the subject of an appeal taken by the appellees herein, which appeal has been docketed in this Court as cause No. 244. The appellants herein, have filed simultaneously herewith their motion in cause No. 244 to affirm that portion of the Judgment of the United States District Court for the Northern District of Illinois, Eastern Division, which declared Subsection (a)(3) of the Illinois Intimidation Statute unconstitutional. Appellants here submit that the trial court erred in declaring the remaining provisions of the Illinois Intimidation Statute to be valid. The provisions of the Intimidation Statute that are the subject of this appeal are set forth below:

Ill. Rev. Stats., Ch. 38, § 12-6.

"(a) A person commits intimidation when, with intent to cause another to perform or to omit the performance of any act, he communicates to another a threat to perform without lawful authority any of the following acts:

(1) Inflict physical harm on the person threatened or any other person or on property; or

(2) Subject any person to physical confinement or restraint; or

* * *

(4) Accuse any person of an offense; or

(5) Expose any person to hatred, contempt or ridicule; or

(6) Take action as a public official against anyone or anything, or withhold official action, or cause such action or withholding, or

(7) Bring about or continue a strike, boycott or other collective action.

"(b) Penalty.

A person convicted of intimidation shall be fined not to exceed $5,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to five years, or both fined and imprisoned."

This statute is patently defective for overbreath. It is also vague and ambiguous. It is no secret that in their efforts to lawfully and peaceably demonstrate and protest

against racial bias, appellants herein engage in direct action activities, with intent to cause the government, businesses, unions and other social and economic institutions and organizations to perform acts to end racial bias, and to omit the performance of acts which result in racial bias.

These appellants further communicate to the targets of their direct actions, threats to continue their direct action and protest activities in the event that their reasonable demands are not met. The treats of appellants, or some of them, to continue their direct action activities occasionally take the form of accusing persons and institutions who are their targets "of an offence"; and may frequently expose such persons and institutions "to hatred, contempt or riducle"; and appellants, or some of them may frequently threaten their targets to "bring about or continue a strike, boycott or other collective action." In these instances, although acting lawfully, and clearly within the framework of their First Amendment privileges, appellants have in the past, and will continue in the future to subject themselves to the proscriptions and penalties of the Illinois Intimidation Statute. Accordingly, the statute undertakes to unreasonably regulate and indeed prohibit lawful conduct as well as conduct which may properly be deemed unlawful. For this reason, the statute is void on its face and the trial court should

have declared it to be unconstitutional. Baggett v. Bullitt, 377 U.S. 360 (1964).

The facts that the kind of direct action protest activity described above may be provocative, and indeed to some obnoxious does not render such activity unprotected; nor is it the kind of activity that may be proscribed as criminal. Cox v. State of Louisiana, 379 U.S. 536 (1965).

As this Court pointed out in NAACP v. Button, 371 U.S. 415 (1963), the meaning of a statute is best understood in light of its "origins and in a setting which it is operated." The statutes challenged herein were adopted by the State of Illinois in 1965, as amendments to the Illinois Criminal Code of 1961; almost admittedly, to deal with and control public protest demonstrations.

The question here is indeed substantial. Appellants submit that the true thrust of the Illinois Intimidation Statute is directed at these appellants. Not only does the statute lend itself to unlawful "selective enforcement," but as the allegations of the complaint filed by plaintiffs show, the discriminatory character of the Illinois Intimidation Statute not only imposes a "chill," but can effectively suppress these appellants in the lawful exercise of their First Amendment rights. Adderley v. Florida, 87 Sup. Ct. 242 (1966).

CONCLUSION

For the foregoing reasons appellants respectfully submit that jurisdiction should be noted. Further, that portion of the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, which declared the statutes challenged herein to be valid should be reversed.

Respectfully submitted,

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CONCLUSION

For the foregoing reasons, appellants respectfully submit that judgment should be reversed, that portion of the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, which declares the statute constitutional should be vacated, and the matter remanded.

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APPENDIX A

United States District Court
Northern District of Illinois
Eastern Division

Lawrence Landry, Rommell Muller, Joseph H. Reynolds, David A. Reynolds, James Washington, Frank Ditto, Robert Lucas, Robert Brown, Michael Rogers, Bernard Hughes, Arnold Ford, Vissa Marie Turner, Wysingo Turner, Andrew Brown, Charles Fletcher, James Jones, Herman Townsend, Jerome Parker, Rudy Hooper, and Act, an unincorporated association,

Plaintiffs,

vs.

No. C 186

Richard J. Daley, Mayor of the City of Chicago, Cook County, Illinois; James Conlisk, Superintendent of Police of the City of Chicago, Illinois; John S. Boyle, Chief Judge of the Circuit Court of Cook County, Illinois; John J. Stamos, State's Attorney of Cook County, Illinois; Raymond F. Simon, Corporation Counsel, City of Chicago, Illinois; Joseph I. Woods, Sheriff of Cook County, Illinois; Richard J. Elrod,

APPENDIX A

Assistant Corporation Counsel, City of Chicago, Division of Ordinance Enforcement; Maurice W. Lee, Magistrate, Circuit Court of Cook County, Illinois; John S. Limperis, Magistrate, Circuit Court of Cook County, Illinois; John T. Burke, Joseph Ratkvich and Robert Kulovitz, Police Officers of the City of Chicago,

Defendants.

Before Hastings, Circuit Judge, Hoffman and Will, District Judges.

OPINION

Will, District Judge. This is allegedly a class action, brought by the plaintiffs pursuant to Rule 23(a)(1)(3) of the Federal Rules of Civil Procedure on their own behalf and on behalf of all others similarly situated, seeking declaratory and injunctive relief. Some of the individual plaintiffs are negro citizens who currently face criminal prosecution before the Circuit Court of Cook County, Illinois. These prosecutions arose out of a series of demonstrations taking place in Chicago, Illinois, in 1967. Plaintiff, Act, is an unincorporated association, maintaining offices in Chicago, Illinois, among the purposes of which is to

secure negro citizens their federal rights and end all forms of racial segregation and discrimination. To obtain these objectives, it engages in a variety of protest activities, including picketing, demonstrations, rallies, mass meetings, voter registration drives, community organization and publication. Plaintiffs, Lawrence Landry, Robert Lucas, Robert Brown and Michael Rogers are negroes and sue as representatives of the class of all negroes in the City of Chicago. Defendants are either officers of the City of Chicago, Illinois, or officers of Cook County, Illinois.

This Court has jurisdiction of this cause on the basis of both general federal question jurisdiction, 28 U.S.C. § 1331, and specific federal jurisdiction over cases seeking relief for certain specified federal wrongs, 28 U.S.C. § 1343.[1]

The complaint alleges that the defendants have purposefully entered into a plan or scheme of concerted and joint action among themselves and with other persons unknown to the plaintiffs to deprive the plaintiffs of rights, privileges and immunities secured to them by the Constitution and laws of the United States. Pursuant to this plan, the defendants have allegedly prosecuted and threatened to prosecute the plaintiffs and

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1. Landry, et al. v. Daley, et al., 67 C 1863, pp. 10-11, opinion dated December 28, 1967 (Will. J.)

other members of the class they represent under color and authority of certain statutes of the state of Illinois and certain ordinances of the City of Chicago. It is alleged that certain plaintiffs and other members of the class have been arrested without warrants of any kind or probable cause while peacefully demonstrating, that prosecutions based on these statutes and ordinances have been instituted against these plaintiffs and that they have been held on unreasonable and exhorbitant bail. The complaint asserts that these arrests and prosecutions, as well as threats of future enforcement of the statutes and ordinances, have been made by defendants without any expectation of securing valid convictions, but rather are part of a plan to employ arrest, detention on excessive bail and threats of prosecution to harass plaintiffs and their supporters and to discourage them from asserting and exercising their federal rights.

The complaint also alleges that the state statutes and city ordinances under which this plan or scheme has been effectuated are unconstitutional on their face.[2] It is contended

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2. The state statutes listed in the complaint are: Ill. Rev. Stat., Ch. 38, § 25-1 (Proscribing "Mob Violence"); Ill. Rev. Stat., Ch. 38, § 31-1 (Proscribing "Resisting or Obstructing a Peace Officer"); Ill. Rev. Stat., Ch. 38, § 21-2 (Proscribing "Aggravated

that these statutes and ordinances are overbroad, vague and indefinite, permit a construction which would violate plaintiffs' First Amendment guarantees and fail to meet the requitites of certainty and specificity which are required of criminal statutes under the principles of due process of law.

On the basis of these allegations, the plaintiffs seek: (1) the issuance of declaratory judgments declaring that the state statutes and city ordinances in question are void on their face as violative of the Constitution of the United States, and/or as applied to the conduct of the plaintiffs herein, (2) the issuance of a permanent injunction restraining the defendants, their agents, and attorneys from the enforcement, operation, or execution of any of these statutes and ordinances, and (3) the issuance of a permanent injunction restraining the defendants, their agents

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Assault"); Ill. Rev. Stat., Ch. 38, § 12-4 (Proscribing "Aggravated Battery"); Ill. Rev. Stat., Ch. 38, § 12-6 (Proscribing "Intimidation").

The city ordinances listed in the complaint are: Municipal Code of Chicago, Ch. 11, § 33 (Proscribing "Obstructing or Resisting a Police Officer"); Municipal Code of Chicago, Ch. 193, § 1 (Proscribing "Disorderly Conduct").

and attorneys from impeding, intimidating, hindering and preventing plaintiffs or members and supporters of Act of exercising the rights, privileges, and immunities guaranteed to them by the Constitution and laws of the United States.

Plaintiffs filed their complaint on October 27, 1967. Simultaneously, they moved that a three-judge court be convened to hear and determine the issues presented therein. Shortly thereafter, both the state and city defendants moved to dismiss, contending, inter alia, that the complaint failed to disclose a basis for equitable relief and that the doctrine of federal abstention should be utilized to allow the state courts an opportunity to adjudicate the issues presented in the complaint.

An opinion dealing with these motions was issued on December 28, 1967.[3] The defendants' motions to dismiss were denied. The complaint was found to raise several substantial constitutional issues within the competency of a three-judge court and to allege a formal basis for equitable relief.

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3. Landry, et al. v. Daley, et al., 67 C 1863, opinion dated December 28, 1967 (Will, J.).

The question of abstention was held to be premature. Plaintiffs' claims regarding the challenged city ordinances, however, were found to be inappropriate for determination by a three-judge court.[4] Accordingly, these claims were severed from the claims involving the state statutes and only the latter have been certified to this tribunal.

The issues involving the alleged unconstitutional application of the challenged state statutes have been held in abeyance pending determination of the constitutionality of the statutes themselves. Briefs addressed to the latter issue have been submitted by the parties, and a hearing on these issues was held on January 27, 1968.

Plaintiffs have abandoned their challenges to the constitutionality of the Illinois "Aggravated Assault"[5] and "Aggravated Battery"[6] statutes. The remaining statutes are: the Illinois "Mob Violence" statute,[7] the Illinois "Intimidation" statute,[8] and the Illinois statute proscribing "Resisting or Obstructing a Peace Officer."[9] Plaintiffs assert that these statutes are unconstitutional on their face for reasons of overbreadth, vagueness and indefiniteness.

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4. Id. at 17-19.
5. Ill. Rev. Stat., Ch. 38, § 12-2.
6. Ill. Rev. Stat., Ch. 38, § 12-4.
7. Ill. Rev. Stat., Ch. 38, § 25-1.
8. Ill. Rev. Stat., Ch. 38, § 12-6.
9. Ill. Rev. Stat., Ch. 38, § 31-1.

THE QUESTION OF FEDERAL FORBEARANCE

The defendants have reasserted the arguments which they raised in their earlier motion to dismiss. They point out that certain of the plaintiffs currently face prosecution in the state courts for violations of the statutes challenged and that these plaintiffs have not asserted any constitutional attack upon any of these statutes in those criminal proceedings, even though such an attack is readily available under Illinois law and procedure. They argue that the plaintiffs have adequate remedies available to them in the state courts and that the mere possibility of an erroneous application of constitutional standards by these courts does not amount to irreparable injury of such a nature as to justify equitable relief. It is also argued that federal declaratory and injunctive relief would be disruptive of the orderly administration of the state courts. Defendants contend, therefore, that this is a proper case for federal abstention.

The defendants' contentions rest on the premises that the principle of federalism requires that a federal district court forbear from direct interference with local law enforcement proceedings. Interference of the nature contemplated herein, it is argued, is destructive of state sovereignty and, hence, jeopardizes our federal system. An ultimate determination of these questions by the state courts, defendants admit, is subject to Supreme Court review. They distinguish such

review from federal action at the present time, since the autonomy of local institutions would not be affected immediately and directly.

While state autonomy is a basic consideration, it is not the only one. Federalism is also designed to check local abuse of essential individual rights arising under the Constitution and laws of the United States.[10] The state courts have a duty to preserve these rights, and it has been generally assumed that they will fulfill this duty. The doctrine of abstention has often been invoked in order to avoid federal interference with state criminal prosecutions.[11] Similarly, limitations on federal equitable relief have been rigorously applied on numerous occasions to achieve the same result.[12] Deference to

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10. See Note, 75 Yale L.J. 1007 (1966).

11. See, e.g., Cleary v. Bolger, 371 U.S. 392 (1962); Pugach v. Dollinger, 365 U.S. 458 (1960), affirming 277 F.2d 739 (5th Cir.); Douglas v. City of Jeannett, 319 U.S. 157 (1942).

12. See, e.g., Cleary v. Bolger, supra note 12; Douglas v. City of Jeannet, supra note 12 at 161-65; Beal v. Missouri Pacific R.R. Corp., 312 U.S. 45, 49-51 (1941); Spielman v. Motor Sales Co., 295 U.S. 89, 95-97 (1935).

the interests and autonomy of the states, however, does not forbid all prior restraint of state criminal proceedings or independent inquiry by a federal tribunal into questions inherently linked with the enforcement of state laws.[13] The federal courts are vested with the primary responsibility of vindicating federal rights.[14] Where state statutes or state conduct allegedly impair rights guaranteed by the Constitution and particularly the First Amendment thereto, federal deference to state tribunals ultimately depends on whether these tribunals can adequately preserve the federal rights of the individual.[15] As is

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13. See, Zwickler v. Koota, 389 U.S. 241 (1967); Dombrowski v. Pfister, 380 U.S. 479 (1965); Carmichael v. Allen, 267 F. Supp. 985 (N.D. Ga. 1967).

14. Zwickler v. Koota, 389 U.S. 241, 251 (1967).

15. See, Zwicker v. Koota, supra note 14 at 249-52; Dombrowski v. Pfister, supra note 14; Cf. Cameron v. Johnson, 381 U.S. 741, 748-49, 755-56 (1965) (disenting opinions). See, also, Brewer, Dombrowski v. Pfister: Federal Injunctions Against State Prosecutions in Civil Cases--A New Trend in Federal-State Judicial Relations, 34 Fordham L. Rev. 71, 90-91 (1965); Note, 75 Yale L. Rev. 1007, 1033-34 (1966).

apparent from recent decisions of the United States Supreme Court and inferior federal courts, the fact that constitutional defenses may be raised in state court criminal proceedings does not in and of itself compel or even permit abstention.

In Dombrowski v. Pfister, 380 U.S. 479 (1965), for example, the Supreme Court clearly dispelled any notion that federalism requires automatic deference to state courts. Dombrowski involved a civil action seeking declaratory and injunctive relief from threatened prosecution under a state anti-subversive statute. The plaintiff alleged, first, that the prosecution was instituted in bad faith solely to discourage civil rights activities and, second, that the statute was an unconstitutionally vague regulation of freedom of expression. The district court dismissed, applying traditional equitable limitations on a federal court's power to enjoin state criminal proceedings and also the doctrine of abstention.[16]

On appeal, the Supreme Court reversed, indicating that either ground, if proven, justified federal equitable relief. The Court stated,

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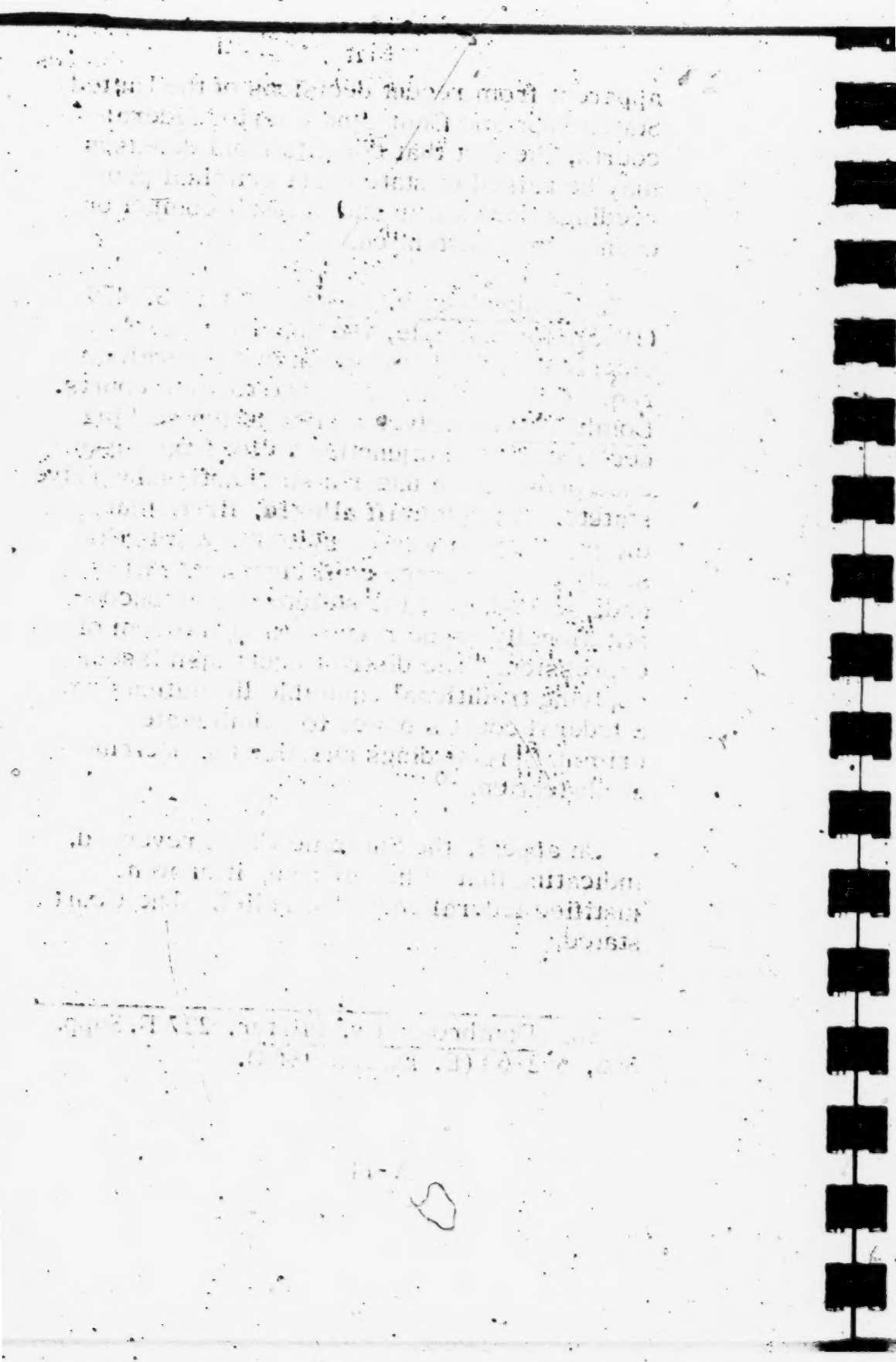
16. Dombrowski v. Pfister, 227 F. Supp. 556, 562-63 (E. D. La. 1964).



> /t/he allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitution rights. They suggest that a substantial loss or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review of this Court of any adverse determination. These allegations, if true, clearly show irreparable injury. 380 U.S. at 485-86.

The Court also held that federal abstention was improper "where... statutes are justifiably attacked on their face as abridging free expression or as applied for the purpose of discouraging protected activities." Id. at 489-90. The controlling consideration on the abstention issue, as on the question of equitable relief, was in the inability of the state court proceedings to assure expeditious vindication of federal rights. Id. at 490-92. Cf. Cameron v. Johnson, 381 U.S. 741, 755 (1965) (dissenting opinion).

In Zwickler v. Koota, 389 U.S. 241 (1967), the Supreme Court again indicated that the federal courts may not defer to the state courts where deference is likely to result in a substantial impairment of federal rights. The appellant in Zwickler had sought injunctive and declaratory relief in a federal

district court from threatened enforcement of a state statute making it unlawful to distribute anonymous political handbills. Appellant contended that this statute was an over-broad regulation of expression. A three-judge district court applied the abstention doctrine, reasoning that abstention was justified where there was no "special circumstances" entitling plaintiff to an injunction against criminal prosecution.[17]

The Supreme Court reversed the district court and remanded the cause, concluding that irrespective of the propriety of federal injunctive relief, it was inappropriate to abstain from declaratory relief.[18] In its opinion, the Court pointed out that the claimed constitutional infirmity was overbreadth and that no state court construction could obviate this vice. Federal forbearance, it reasoned, would result in delay during which the valid exercise of First Amendment rights might be inhibited.[19] Under such circumstances, it concluded that the federal courts have a duty to provide a federal forum for at least declaratory clarification of the federal claim.[20]

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17. Zwickler v. Koota, 261 F.Supp., 985, 993 (E. D. N. Y. 1966).

18. 389 U.S. 241, 254-55 (1967).

19. Id. at 249-52.

20. Id. at 245-48, 251-52.

The principles announced by the Supreme Court in Dombrowski and Zwickler appear clearly applicable in the instant case. Plaintiffs claim that statutes invalid because of vagueness, indefiniteness and overbreadth have been used by defendants in furtherance of a scheme to discourage plaintiffs' legitimate exercise of First Amendment rights. In Dombrowski, the Court indicated that defense in a state criminal prosecution is not sufficient to correct either of these evils. Arrest, detention, and threats of prosecution may have an in terrorem effect on free expression. Where prosecutions are instituted in bad faith in furtherance of a scheme to discourage protected activities, the ultimate success of the defendant does not alter the impropriety of the unconstitutional scheme.[21] The adjudication simply resolves the guilt or innocence of the defendant; it does not purge the scheme of its impact upon federally protected rights.[22]

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21. 380 U.S. at 490.

22. Although Dombrowski dealt only with bad faith enforcement of statutes regulating speech, commentators have suggested that its holding is not limited to the First Amendment area. See, Brewer, Dombrowski v. Pfister: Federal Injunctions Against State Prosecutions in Civil Rights Cases--A New Trend in Federal-State Judicial Relations,

Similarly, the possible application of a vague, uncertain, or overbroad statute regulating freedom of expression may have an inhibiting effect on the valid exercise of freedom of expression. Where prosecution is instituted under such a statute and its provisions are not susceptible to clarification in a single prosecution, defense in a state criminal proceeding is likely to lead to piecemeal construction resolving only the uncertainty of the defendant with no likelihood of obviating similar uncertainty for others.[23] Those affected or potentially affected by such a statute, however, are entitled to be free from the burden of resolving its uncertainty through state prosecutions.[24]

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34 Fordham L. Rev. 71 (1965); Note, 75 Yale L. Rev. 1007, 1033-34 (1966). Cf. Bailey, Enjoining State Criminal Prosecutions Which Abridge First Amendment Freedoms, 3 Harv. Civ. Rights Lib. L. Rev. 67 (1967).

23. See, 380 U.S. at 490-92. See, also Cameron v. Johnson, 381 U.S. 741, 755 (1967) (dissenting opinion).

24. 389 U.S. at 491.

Defendants contend that the conduct of the plaintiffs who are facing state prosecution is "hard core conduct" which would obviously be prohibited in a narrow and clearly constitutional construction of the statutes. Hence, they argue, federal equitable relief is completely unwarranted. But even assuming arguendo that equitable relief is unwarranted, this does not, as Zwickler holds, obviate plaintiffs' right to declaratory relief. Moreover, the class also includes plaintiffs who do not now face prosecution. The statutes in dispute are challenged on grounds of overbreadth, as well as vagueness.[25] Zwickler

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25. It should be noted that Dombrowski specifically held that federal abstention is inappropriate where a statute regulating expression is challenged on grounds of vagueness. 380 U.S. at 489-90. Normally, the state must assume the burden of obtaining a permissible narrow construction by way of a declaratory judgment proceeding, if it wishes to avoid a federal proceeding. Id. at 491. There is an exception to this prescription. Where a readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution, federal forbearance is proper. Id. at 491. It is apparent, however, that this exception applies only if the entire statute is amenable to correction in one prosecution where all vagueness and overbreadth will be eliminated. Bailey, Enjoining State

indicates that under such circumstances a federal court has a duty to adjudicate the federal claims which are before it and to render declaratory relief one way or the other.[26]

Criminal Prosecutions Which Abridge First Amendment Freedoms, 3 Harv. Civ. Rights-Civ. Lib. L. Rev. 67, 90 (1967).

The plaintiffs in the present suit challenge three different state statutes on both grounds of vagueness and overbreadth. One of these statutes, the Intimidation statute, is not involved in any of the prosecutions currently pending in the state courts. It is obvious, therefore, that the present suit does not come within the exception recognized in Dombrowski.

26. See, 389 U.S. at 249-50, 253-54. It should also be noted that the normal rules of standing are relaxed in the area of First Amendment freedoms. Defendants under criminal prosecution are permitted to challenge overbroad statutes on their face, without demonstrating that their own conduct could not constitutionally have been proscribed by a different and more precise enactment. See Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940).

THE APPLICABLE CONSTITUTIONAL PRINCIPLES

As noted earlier, this suit arises out of the application and threatened future application of certain Illinois statutes and ordinances of the City of Chicago to plaintiffs' civil rights activities. The claims regarding the application of the city ordinances do not pose a proper question for a three-judge court and have been severed from the instant proceeding for consideration by a single judge. The plaintiffs' claims in regard to the remaining state statutes are, first, that these statutes have been applied in bad faith, solely for the purpose of discouraging their civil rights activities, and, second, that the Illinois "Mob Action" statute, "Resisting Arrest" statute, and "Intimidation" statute are unconstitutionally uncertain both for reasons of vagueness and overbreadth. The adjudication of the first grounds has been held in abeyance and the scope of the present inquiry, accordingly, has been limited to the constitutionality of the provisions of the three statutes which plaintiffs assail. Before undertaking any discussion of these specific statutes, however, a brief canvass of the applicable constitutional principles would seem appropriate.

In its most basic sense, the present suit involves the boundaries of state regulation of demonstrations, picketing, mass protest meetings, marches, and similar assemblies. Although demonstrations are distinguishable

from other forms of self expression, it is generally recognized that they are within the protection of the First Amendment. There are two basic reasons for this. The first is that the fundamental considerations underlying the rights of free speech and peaceful assembly are also relevant to peaceful demonstration. Peaceful demonstration, like the rights of free speech and peaceful assembly, advances society's interests in a variety of ways. Through peaceful demonstration, individual members of society may express their views and thereby participate in the political apparatus of a democracy. Demonstration, like most conventional means of expression, also assures the disclosure and discussion of the real issues faced by society, thereby making possible rational judgment by the electorate. It provides an outlet for dissenting people, and history reveals that dissentient groups are more likely to adhere to the majority will, if their views have also been aired. Similarly, it provides minorities an opportunity to force re-examination of social institutions, to enlist the sympathy of other citizens, to mobilize supporters and ultimately to strengthen their bargaining position.[27] Ultimately, therefore, peaceful demonstration plays a role in the maintenance of a balance between stability

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27. See Note, 80 Harv. L. Rev. 1773 (1967).

and change in society, very much like other First Amendment rights.

The second reason is that peaceful demonstration is a practical means of political protest.[28] More conventional means of self-expression often are of little real utility to political minorities. The instruments of mass media may be beyond their financial resources and political leaders may turn a deaf ear to persons who are unpopular with, or unknown to, the general public. A demonstration, therefore, may be the only effective means by which a minority can publicize a message or reach a desired audience.[29]

Demonstrations will sometimes, however, conflict with various other ligitimate state interests. In such instances, their social value must be subordinated to other values and considerations. Perhaps the most important counter-vailing consideration is the state's interest in preventing physical violence or abuse of property. Thus demonstrations lose their constitutional protection, if the participants engage in violence.[30] And,

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28. See Adderley v. Florida, 385 U.S. 39, 50-51 (1966) (dissenting opinion).

29. Note, 80 Harv. L. Rev. 1773 (1967).

30. See, e.g., Feiner v. New York, 340 U.S. 315 (1951); Pritchard v. Davis, 326 F.2d 323 (1964): Note, 80 Harv. L. Rev. 1773, 1774-75 (1967).

under certain circumstances, conduct short of violence may also subject demonstrators to arrest or dispersal. For instance, provocative conduct or language which undertakes incitement to riot may also lead to loss of constitutional protection.[31] Other state interests which have been held to justify similar regulation of demonstrations include the maintenance of the free flow of traffic[32] and the prevention of substantial interference with government operations or the regular use of public property.[33]

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31. See Feiner v. New York, 340 U.S. 315, 321 (1951); Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942). Although the Supreme Court accorded protection to "boisterous," "loud," and "flamboyant" conduct in Edwards v. South Carolina, 372 U.S. 229, 233 (1963), even noisy conduct may justify restrictions on demonstrations under some circumstances. See Kovacs v. Cooper, 336 U.S. 77 (1949).

32. E.g., Farmer v. Moses, 232 F.Supp. 154 (S.D.N.Y. 1964); Clemons v. Congress of Racial Equality, 201 F.Supp. 737 (E.D. La. 1962). See, also, Cox v. Louisiana, 379 U.S. 536, 554-55 (1965).

33. See Adderley v. Florida, 385 U.S. 39 (1966); United States v. Aarons, 310 F.2d 341 (2d Cir. 1962); Frend v. United States, 100 F.2d 691 (C.D. Cir.) cert. denied, 306 U.S. 640 (1938). See, also, Brown v. Louisiana,

Although the Supreme Court has indicated that demonstrations are subject to greater state regulation than "pure speech,"[34] it seems clear that the state may only impose "reasonable" restrictions on time, place, duration, or manner.[35] The reasonableness of a regulatory measure must necessarily be

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383 U.S. 131, 157 (1966) (dissenting opinion); Cox v. Louisiana, 379 U.S. 536, 561-64 (1965). Other state interest which might justify restrictions on demonstrations in some circumstances would seem to include the interests of protecting individual privacy and private property. See Kamin, Residential Picketing and the First Amendment, 61 N.W.L. Rev. 177 (1966); Note, 80 Harv. L. Rev. 1773, 1777-80 (1967).

34. See Cox v. Louisiana, 379 U.S. 536, 555 (1965). For instance, a distinction between "pure speech" and "speech plus" might be drawn. See Kalvin, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 22-25 (1965). This distinction, however, would seem to merely point out that certain state interests may conflict with the right to demonstrate and other forms of "speech plus" to a greater extent than with "pure speech."

35. See Cox v. Louisiana, 379 U.S. 536, 558 (1965).

viewed in terms of the competing interests of the demonstrators and the state. In cases where the reasonableness of the application of a regulatory measure is challenged, this question ultimately depends upon the balance of a number of factors: the gravity of the evil which the state seeks to prohibit, the probability of the evil, the conduct and intent of the demonstrators, the circumstances of the demonstration, and the alternatives open to the government which infringe upon the demonstrator's interests to a lesser extent.[36] In cases where the reasonableness of the regulatory measure itself is challenged, as in the present case, the constitutionality of the regulation turns upon its certainty and its breadth.[37]

The cases in this latter category actually involve two distinct concepts: (1) vagueness

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36. See Yates v. United States, 354 U.S. 298, 318-27 (1957); Dennis v. United States, 341 U.S. 494, 508-11 (1951). See, also, Mendelson, Clear and Present Danger Test--From Schenck to Dennis, 52 Colum. L. Rev. 313 (1952); Richardson, Freedom of Expression and the Function of Courts, 65 Harv. L. Rev. 1 (1951); Note, 71 Harv. L. Rev. 85, 123-25 (1957).

37. See, Ashton v. Kentucky, 384 U.S. 195, 200-201 (1966); Shuttleworth v. City of Birmingham, 382 U.S. 87, 93-95 (1965); Baggett v.

or indefiniteness, and (2) overbreadth.[38] These questions frequently overlap in any given case and are often loosely referred to in the aggregate as the "vagueness doctrine." Their application, however, is based on different constitutional principles.

The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. The primary issues involved are whether the provisions of a penal statute are sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid

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Bullitt, 377 U.S. 360, 373-84 (1964); Edwards v. South Carolina, 372 U.S. 229, 237-38 (1963); N.A.A.C.P. v. Button, 371 U.S. 916, 432-38 (1963).

38. See, generally, Collings, Unconstitutional Uncertainty--An Appraisal, 40 Cornell L. Rev. 195 (1965). Cf. Amsterdam, The Void-For-Vagueness Doctrine In The Supreme Court, 109 U. Penn. L. Rev. 67 (1960).

its penalties and to apprise judge and jury of standards for the determination of guilt.[39] If the statute is so obscure that men of common intelligence must necessarily guess at its meaning and differ as to its applicability, it is unconstitutional.[40]

The concept of overbreadth, on the other hand, rests on principles of substantive due process which forbid the prohibition of certain individual freedoms. The primary issue is not reasonable notice or adequate standards, although these issues may be involved. Rather the issue is whether the language of the statute, given its normal meaning, is so broad that its sanctions may apply to conduct protected by the Constitution.[41] Frequently, the resolution of this issue depends upon whether the statute permits police and other officials to wield unlimited discretionary powers in its enforcement.[42] If the scope of the power

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39. See Collings, supra note 38 at 196-97.

40. E.g., Baggett v. Bullitt, 377 U.S. 360, 367-73 (1964); Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1961); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

41. See Collings, supra note 38 at 196-97.

42. See, e.g., Ashton v. Kentucky, 384 U.S. 195, 200-201 (1966); Shuttleworth v. City of Birmingham, 382 U.S. 87, 90-92 (1965);

permitted these officials is so broad that the exercise of constitutionally protected conduct depends on their own subjective views as to the propriety of the conduct, the statute is unconstitutional.[43]

These concepts have particular relevance to statutes touching upon the areas of free speech and assembly. Although the state may regulate speech and assembly where the exercise of these rights conflicts with certain state interests, it may regulate only to the extent necessary to discharge these interests.[44] A vague or overbroad statute, however, is likely to have a deterrent effect which is beyond that necessary to fulfill the state's

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Edwards v. South Carolina, 372 U.S. 229, 237-38 (1963).

43. See, e.g., Shuttleworth v. Birmingham, 382 U.S. 87, 90 (1965); N.A.A.C.P. v. Button, 371 U.S. 415, 433, 435-36 (1963). See, also, Amsterdam, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. of Pa. L. Rev. 67, 75-76, 80-81, 96-104 (1960). Cf. Baggett v. Bullitt, 377 U.S. 360 371 (1964); Smith v. California, 361 U.S. 147, 151 (1961).

44. See DeJonge v. Oregon, 299 U.S. 363 365-66 (1937); Stromberg v. California, 283 U.S. 359 (1931); Cf. Yates v. United States, 354 U.S. 298 (1957).

interests. Rather than chance prosecution, people will tend to refrain from speech and assembly which might come within the statute's ambit.[45]

Such a deterrent effect on the exercise of these rights is impermissible under the First Amendment.[46] The Amendment was designed not only to protect these rights, but also to encourage their use. Consequently, the requirements of clarity, definiteness, and narrow scope are most strictly observed when a statute places a possible limitation upon First Amendment rights.[47]

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45. Dombrowski v. Pfister, 380 U.S. 479, 486-89 (1965); N.A.A.C.P. v. Button, 371 U.S. 415, 432-33 (1963); Winters v. New York, 333 U.S. 507, 519-20 (1948); Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940); Herndon v. Lowry, 301 U.S. 242, 261-62 (1937).

46. See, e.g., Dombrowski v. Pfister, supra at 494-96; Freedman v. Maryland, 380 U.S. 51, 59-60 (1965); N.A.A.C.P. v. Button, supra at 437; Thornhill v. Alabama, supra at 101-106.

47. E.g., Keyishian v. Board of Regents, 385 U.S. 589, 603-04 (1967); Cox v. Louisiana, 379 U.S. 536, 551-52 (1965); Edwards v. South Carolina, 372 U.S. 229, 237-38 (1963); Cramp v. Board of Public Instruction, 368 U.S. 278, 287-88 (1961).

Such scrutiny is necessary to provide a buffer between the valid exercise of the police power by the state and excessive restriction of the free dissemination of ideas.[48]

A number of factors are taken into consideration in determining whether a state regulation meets these standards of clarity and narrowness. Among them are: (1) whether a substantial interest worthy of protection is identified or apparent from the language of the statute;[49] (2) whether the terms of the regulation are susceptible to objective measurement by men of common intelligence;[50] (3) whether those charged with its enforcement are vested only

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48. This rationale has been described most succinctly by Mr. Justice Brennan for the Court in N.A.A.C.P. v. Button, 371 U.S. at 433: "These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." See, also, Amsterdam, supra note 43 supra.

49. See Note, 80 Harv. L.Rev. 1773, 1788 (1967).

50. See Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967). See, also, authorities cited in note 40 supra and accompanying text.

with limited discretion;[51] (4) if penal, whether some element of knowledge or intent to obstruct a state interest is required;[52] and (5) whether its clarity is dependent upon manifold cross-reference to interrelated enactments or regulations.[53]

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51. Compare Cox v. New Hampshire, 312 U.S. 569, 575-76 (1941); with, Shuttleworth v. Birmingham, 382 U.S. 87, 90-92 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963).

52. See Adderley v. Florida, 385 U.S. 39, 42-43 (1967). See, also, Cox v. Louisiana, 379 U.S. 559 (1965), wherein a Louisiana statute regulating picketing in or near a court house "with intent to interfere" with the administration of justice was upheld as valid on its face. On other occasions, the Supreme Court when holding a statute unconstitutional has emphasized the fact that the law reached innocuous acts. Keyishian v. Board of Regents, 385 U.S. 589, 599-601 (1967); Baggett v. Bullitt, 377 U.S. 360, 368-72 (1964). Moreover, the Supreme Court has held on a number of occasions that a conviction based upon membership in a group which pursues illegal ends requires a specific intent to further such ends. See Elfbrant v. Russell, 384 U.S. 11, 19 (1966); Cramp v. Board of Public Instruction, 368 U.S. 278, 285-87 (1964); Noto v. United States, 267 U.S. 290, 299-300 (1961). Cf. Collings, supra note 38 at 227-231.

53. See Kyishian v. Board of Regents, 385 U.S. 589, 604 (1967).

THE MOB ACTION STATUTE

Plaintiffs contend that the Illinois Mob Action statute, Ill. Rev. Stat., Ch. 38, § 25-1, is void for both reasons of vagueness and overbreadth. It provides:

> (a) Mob action consists of any of the following:
>
> (1) the use of force or violence disturbing the public peace by two or more persons acting together and without authority of law; or
>
> (2) The assembly of two or more persons to do an unlawful act; or
>
> (3) The assembly of two or more persons, without authority of law, for the purpose of doing violence to the person or property of any one supposed to have been guilty of a violation of the law, or for the purpose of exercising correctional powers or regulative powers over any person by violence.
>
> (b) Any person engaged in mob action shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed thirty days, or both.
>
> (c) Any participant in a mob action which shall by violence inflict injury to the person or

or property of another shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or in the penitentiary from one to five years, or both fined and imprisoned.

(d) Any participant in a mob action who does not withdraw on being commended to do so by any peace officer shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both.

This statute is a section of the Illinois Criminal Code of 1961. It represents a compilation of the prior criminal offenses of rout, riot, affray, unlawful assembly and mob action.[54] The statute has not been construed by the Illinois courts. Under these circumstances, we must place our own construction on the statute, giving the words their reasonable and natural meaning.

The statute proscribes three separate categories of conduct as "Mob Action." Since these provisions are not interdependent and the validity of the statute as a whole would not rest on any one of them,[55] we shall examine each separately.

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54. Ill. Rev. Stat. Ann. ch. 38, § 25-1 (Smith-Hurd 1964) (Committee Comments).

55. See Ill. Rev. Stat. Ann. ch. 38, § 34-2 (Smith-Hurd 1964).

Subparagraph (1)(a) proscribes:

> The use of force or violence disturbing the public peace by two or more persons acting together and without authority of law.

It is obvious that this provision was designed for the protection of persons and property and for the maintenance of public order. It cannot be questioned that the state of Illinois has an interest in preventing physical violence to persons or abuse to private or public property. Indeed, the constitutional guarantee of liberty presupposes the existence of an orderly society, wherein grievances and disputes are settled by peaceful means rather than force and violence. This is a sufficiently strong state interest to justify regulation of certain demonstrations.

Although this provision resembles breach-of-peace statutes, it is not so vague or indefinite as to be invalid. The use of "force or violence" is specifically required. The words "force" and "violence" are not so obscure as to fail to advise the public of the prohibited conduct. In common parlance, force means "power, violence, compulsion, or constraint exerted upon or against a person or thing." [56] The word "violence"

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56. Webster, New International Dictionary, p. 3a (3d ed. 1963 Unabridged). It is also defined as "violence or such threat or display of physical aggression toward a person as reasonably inspires fear of pain, bodily harm, or death. Id. at p. 3c.

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Subparagraph (1)(a) prescribes:

> The use of force or violence disturbing the public peace by two or more persons acting together and without authority of law.

imparts a similar meaning. It means "the exertion of any physical force so as to injure or abuse."[57] "Force," "violence," "compussion," "constraint," and "restraint" convey a similar idea of the exertion of power against the will, wish or consent of another.[58] Given a reasonable and natural construction, these terms connote either physical attack upon person or property, or physical aggression reasonably capable of inspiring fear of injury or harm to a person or property. We believe it is apparent, then, that a reasonable interpretation of this provision precludes its applicability to the peaceful exercise of the rights of free speech and assembly.

The statute further requires that two or more persons be "acting together" and "without authority of law." We see no ambiguity in the phrase "acting together." In the context of this provision, it conveys combined, conjoint or concerted action. The phrase "without authority of law" is apparently designed to limit the scope of the enactment by excepting those situations in which the law recognizes a justifiable use of force, such as by police

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57. Webster, New International Dictionary p. 1a (3d. ed. 1963 Unabridged).

58. People v. McIlvain, 55 Cal. App. 2d 131, 134 (2d Dist. 1942).

officers, to the extent reasonably necessary to effect an arrest; by persons acting in self-defense, etc.[59] While for reasons explained later herein, the phrase lacks some clarity, this would not seem fatal to this provision.

Similarly, subparagraph (a)(1) does not seem susceptible to an overbroad application. The use of force or violence is specifically required before it is applicable.[60] It proscribes only non-peaceful demonstrations and is not suggestive of a vehicle for the suppression of ideas. Moreover, the use of force or violence carries with it sub silentio a destructive or threatening intent. Furthermore, the scope of the provision is narrowed by the requirements that the persons to which it is

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59. See Ill. Rev. Stat. Ann. Ch. 38, § 7-1, et seq. (Smith-Hurd 1964).

60. Although the standard breach-of-peace statute may be so broad and all-embracing that its constitutionality becomes doubtful, the crucial defect stressed by the Supreme Court in both Cox v. Louisiana, 379 U.S. 536 (1965), and Edwards v. South Carolina, 372 U.S. 229, 237 (1963), was the use of such a statute against peaceful conduct. In Cox, however, the Court seemed to suggest that breach-of-peace statutes may still be used to convict demonstrators who are either violent or past the bounds of argument. 279 U.S. at 551-52. Note, 80 Harv. L. Rev. 1773, 1783 (1967). Clearly, therefore, where the statute itself requires violence, it would appear to be constitutional.

applicable be "acting together" and "without authority of law." Even without the latter phrase, this provision reaches only a narrow scope of conduct which is not protected by the First Amendment.

Subparagraph (a)(2) proscribes:

> The assembly of two or more persons to do an unlawful act; or

The revisor's note to the Illinois Criminal Code of 1961 indicates that this provision incorporates the common-law offense of "unlawful assembly."[61] We do not doubt that the state of Illinois has a valid interest in preventing a project which will breach its criminal laws. However, the language of subparagraph (a)(2) is not so limited. This provision proscribes an assembly to do an "unlawful act." The phrase "unlawful act" in its normal meaning is not limited to criminal illegality; it includes city regulatory ordinances, quasi-criminal ordinances, torts, or other civil wrongs.[62] This implies

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61. Ill. Rev. Stat., Ann. Ch. 38, § 25-1 (Smith-Hurd 1964) (Committee Comments).

62. For instance, the phrase "unlawful act" may be contrasted with the term "offense." This latter term is specifically defined as and limited to the "violation of any penal statute of the state." Ill. Rev. Stat., Ch. 38, § 2-12 (1967).

protection of other state interests which are not readily apparent, and which may not justify suppression of speech or assembly.

This provision certainly goes beyond narrowly drawn statutes "concerning the time, place, duration or manner of use of the streets for public assemblies."[63] Moreover, the phrase "unlawful act" fails to apprise the public of the prohibited conduct. Men of ordinary intelligence have no way of ascertaining what breach of criminal or civil law may subject them to arrest and prosecution.

Under a literal application of the section, a wide variety of conduct which would at most constitute a misdemeanor or which might involve no criminal act at all but which would be "unlawful" merely in a civil sense becomes felonious if two or more persons gather together to perform it. Moreover, the language apparently would make the act of assembling to contemplate or consider "unlawful" conduct a crime even though the project was ultimately abandoned and the "unlawful" acts never performed.

Perhaps this provision's greatest vice is that it is a ready vehicle for the suppression

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63. See Cox v. Louisiana, 379 U.S. 536, 558 (1965).

of ideas. Failing as it does to define what constitutes an "unlawful act," it leaves too much to the calculation of its enforcer. If the ideas portrayed by demonstrators do not coincide with the subjective views of police, any technical violation of either civil or criminal law may be invoked to suppress a demonstration.[64] The "potential for arbitrarily suppressing First Amendment liberties" is all too clear. Shuttleworth v. Birmingham, 382 U.S. 87, 90-91 (1965). In light of the protection afforded peaceful assembly by the First Amendment, we conclude that this provision is impermissively vague and overbroad.

Subparagraph (a)(3) proscribes:

> The assembly of 2 or more persons, without authority of law, for the purpose of doing violence to the person or property of any one supposed to have been guilty of a violation of the law, or for the purpose of exercising correctional powers or regulative powers over any person by violence.

The gist of this offense is "the exercise by violence of purported correctional power."[65]

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64. In this sense, it is similar to the statutes which were overturned in Cox v. Louisiana, 379 U.S. 536, 555-57 (1965) and Edwards v. South Carolina, 372 U.S. 229, 233-37 (1963).

65. Ill. Rev. Stat. Ann. Ch. 38, § 25-1 (Smith-Hurd 1964) (Committee Comments).

It is readily apparent that this provision is designed to protect persons and their property who are accused of crime or otherwise subject to public warth.[66] Thus, it involves not only the interest of protecting persons and property, but also the interest of preventing the usurpation of the police powers by unauthorized groups. These interests are sufficiently strong to justify regulation of such demonstrations.

This provision contains no patent ambiguities. The word "assembly" has a definite connotation in every day conversation as meaning "a

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66. The predecessor of this provision was the subject of an opinion in Slaton v. City of Chicago, 8 Ill. App. 2d 47, 130 N. E. 2d 205 (1st Dist. 1955). As interpreted therein one of the purposes of this provision is "to discourage and prevent interference with the orderly processes of administering the law or powers delegated to the lawful authorities, and the usurpation of those powers, wholly or in part, by unauthorized groups of persons for what they wrongfully assume to be a collective interest." Id. at 57, 130 N. E. 2d at 210. See also, Anderson v. City of Chicago, 313 Ill. App. 616, 40 N. E. 2d 601 (1st Dist. 1942).

company of persons collected together in one place for some common purpose."[67] The phrase "without lawful authority" obtains meaning from the purpose and context of the provision. It excludes police and other officials who can legally exercise the police power. Similarly, the word "violence" as noted above, conveys a commonly understood meaning and as used herein connotes either physical attack upon persons or property, or physical aggression reasonably capable of inspiring fear of injury or harm.

Amici curiae urge that this provision is invalid for vagueness because it includes an assembly "for the purpose of exercising correctional powers or regulative powers over any person." Rather than broadening the scope of the provision, however, this language limits it. When the last two words "by violence" are included, it clearly proscribes only an assembly for the purposes of administering punishment to or exercising coercion upon a person by physical force. Given a reasonable and natural construction, therefore, this provision does not fail to provide fair notice or adequate standards.

Likewise, the section poses no problems of scope. It is directed only at conduct which

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67. Webster, New International Dictionary, p. 1a (3d ed. 1964, Unabridged).

endangers persons or property and which usurps the role of the state. It requires specific intent, i.e., an intent to do violence to a person or his property or an intent to exercise corrective powers or regulatory powers over a person by violence. The use of the word "assembly" requires that this intent be shared by members of the group. These standards clarify and narrowly limit the scope of the section. Normally construed and properly applied, this provision is neither vague nor overbroad.

The "Mob Action" statute also promulgates three penalties for the conduct proscribed therein. Amici curiae suggest that the language used in each of these provisions is ambiguous when read in reference to the proscribed conduct. For purposes of clarity, the effect of each of these provisions will be considered separately.

Sub-section (b) provides penalties in regard to "any person engaged in mob action." The basic question is how the phrase "engaged in" is to be read in reference to subparagraphs (a)(1) and (a)(3). The word "engage" has a common, well-understood import. It means "to occupy, to employ, or to involve."[68] When the phrase "any person engaged in" is

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68. Webster, New International Dictionary, n. 1 (3d ed. Unabridged).

read in conjunction with subparagraph (a)(1) a clear and narrow meaning emerges; any person occupied in or employed in the use of force or violence is subject to penalty. This meaning poses no problems of breadth or clarity.

When the phrase "engaged in" is read in conjunction with subparagraph (a)(3) a similarly clear and narrowing meaning is apparent. Any person who is employed or occupied in a group with a common purpose to use violence against a person or property or to punish or coerce a person by violence is subject to penalty. This language is clear and poses no problems of substantive due process.

Subsection (c) provides penalties for "any participant in a mob action which shall by violence inflict injury to the person or property of another." "Participant" is commonly defined as "one that takes part or shares in something with others."[69] Given a reasonable and natural construction, this phrase, when read in conjunction with subparagraph (a)(1), means one who takes part in or shares in the use of force or violence. Similarly, this phrase, when read in conjunction with subparagraph (a)(3), means one who takes part

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69. Webster, New International Dictionary n. 1 (3d ed. Unabridged).

in or shares in a group with a common purpose to use violence against a person or property or to punish or coerce a person by the use of violence. These constructions would seem readily apparent to men of ordinary intelligence.

Nevertheless, the scope and clarity of this provision has been challenged. Implicit in the statute, it is argued, is a distinction between being actually "engaged in" a mob action and being a "participant" in a mob action. The former phrase implies the applicability of the statute to those who actually are involved in a scheme prohibited by subparagraph (a)(3). The latter phrase, it is contended, implies the applicability of the statute to those who are involved to a lesser extent. It is urged that the statute might properly be construed to be applicable to persons who participate in an initially peaceful demonstration, when unbeknown to them or contrary to their desires and intention, other members of the group commit violence inflicting injury during the course of the demonstration. In other words, it is argued that the statute might be applicable to a peaceful member of an assembly who supports the lawful but not unlawful purpose of the assembly. Indeed, it is contended that the word "participant" is so ambiguous that the statute might be applicable to a bystander in close proximity to the violent "mob action."

We need not speculate about the possible implications of the word "participant." As

noted earlier, the Mob Action statute is a provision of the Illinois Criminal Code of 1961. It is limited, as are the other statutes in the Criminal Code, by the provisions of Ill. Rev. Stat., Ch. 38, § 4-3 (1967).

Section 4-3(a) provides that a person is not guilty of an offense, other than an offense which involves absolute liability, unless with respect to each element described by the statute defining the offense, he acts while having one of the mental states described subsequently in the Code. Section 4-3(b) further provides in pertinent part:

> If the statute does not prescribe a particular mental state applicable to an element of an offense . . . , any mental state defined in Sections 4-4 [defining "Intent"], 4-5 [defining "Knowledge"], or 4-6 [defining "Recklessness"] is applicable.

The Mob Action statute does not involve absolute liability.[70] Therefore, a person cannot be guilty of the conduct proscribed by the

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70. See Ill. Rev. Stat., Ch. 38, § 4-9 (1967).

Mob Action statute unless he intentionally,[71] knowingly,[72] or recklessly engages in such

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71. A person intends, or acts intentionally or with intent, to accomplish a result or engage in conduct described by the statute defining the offense, when his conscious objective or purpose is to accomplish that result or engage in that conduct. Ill. Rev. Stat., Ch. 38, § 4-4 (1967).

72. A person knows, or acts knowingly or with knowledge of:

(a) The nature or attendant circumstances of his conduct, described by the statute defining the offense, when he is consciously aware that his conduct is of such nature or that such circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that such fact exists.

(b) The result of his conduct, described by the statute defining the offense, when he is consciously aware that such result is practically certain to be caused by his conduct.

Conduct performed knowingly or with knowledge is performed wilfully, within the meaning of a statute using the latter term, unless the statute clearly requires another meaning. Ill. Rev. Stat., Ch. 38, § 4-5 (1967).

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conduct. These requirements substantially narrow the scope of the offense. They clarify and limit it and supply objective standards for the adjudication of guilt.[74]

Moreover, in light of these requirements it can not be said that the inclusion of the word "participant" in a statute aimed primarily at the use of force and violence vests police with unfettered discretion. Certainly, the interest of the state in preserving the peace requires that police have the discretion to arrest those who utilize force and violence. Thus, the discretion vested in the police by this provision seems to be the type of narrow discretion

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74. The incorporation in the Mob Action statute of these requisite mental states by reference would not seem defective to the clarity of this statute. The regulatory system established by these five statutes is not so formidably elaborate and complex as to discourage expression by minority groups through fear of a regulatory imbroglio. See Note 80 Harv. L. Rev. 1773, 1778 (1967). This situation is a far cry different from that in Keyishian v. Board of Regents, 385 U.S. 589 (1967), where the appellants were confronted by several statutes, numerous regulations and intricate administrative machinery regarding teacher loyalty oaths.

which the Supreme Court has recognized as the proper role of responsible officials in making determinations concering the imminence of disorder.[75] In addition, the applicability of this provision is further limited by the phrase "mob action which shall by violence inflict injury to the person or property of another." This phrase restricts the proper exercise of police discretion under this section to those situations in which violence has already erupted. We conclude, therefore, that this provision is sufficiently narrow and specific.

Subsection (d) similarly provides penalties in regard to "any participant in a mob action who does not withdraw on being commanded to do so by any peace officer" Amici curiae have also challenged the clarity and scope of this provision, pointing again to the inclusion of the word "participant" and suggesting that it is too vague and broad. As stated above, the requisite mental states which have been incorporated by reference into this provision sufficiently clarify and narrow its scope and preclude its application to peaceful participants or innocent bystanders. The additional requirement of a refusal to withdraw does not subvert this conclusion.[76] On the contrary,

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75. See Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942). Cf. New York v. Feiner, 340 U.S. 315 (1951).

76. Indeed, in Cox v. Louisiana, the Supreme Court indicated that such a withdrawal provision

it further limits the scope of the enactment as a whole, and the discretion of those charged with its enforcement. It is clear, therefore, that this provision cannot be challenged on these grounds.

Lest there be any doubt concerning what we conceive to be the narrow scope of this section as properly interpreted, it does not constitute an offense hereunder for a participant in a peaceful demonstration to refuse to withdraw on command of a peace officer. Peaceful demonstrations do not constitute "mob action" under the statute.

THE RESISTING OR OBSTRUCTING A PEACE OFFICER STATUTE

Plaintiffs also contend that the Illinois "Resisting Arrest" statute, Ill. Rev. Stat., Ch. 38, § 31-1, is void both for reasons of vagueness and overbreadth. It provides:

> A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer of any authorized act within his official capacity shall be fined not to exceed $500 or imprisoned in a

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is constitutionally permissible if embodied in a statute which is otherwise sufficiently narrow and precise and which protects a justifiable state interest. See 379 U.S. at 551.

penal institution other than a penitentiary not to exceed one year, or both.

This statute has likewise not been construed by the Illinois courts. We must, therefore, again place our own construction upon it, giving the words their reasonable and natural construction.

This statute is designed to deter a person from resisting or interfering with the acts of law enforcement officials, simply on the basis of the person's own conclusion as to the impropriety of the act. It thus furthers the legitimate state interest in protecting peace officers, preventing frustration of the valid enforcement of the law, and promoting orderly and peaceful resolution of disputes.[77] It is obvious, therefore, that this statute is not directed at peaceful assembly. Its enforcement, at times, may conflict with assembly, but in such instances, the public interest in discouraging violence and insisting upon the use of peaceful methods of obtaining redress from unlawful acts outweighs the recognition of the feelings of the demonstrators.[78]

The gist of the offense is "resisting" or "obstructing" the valid acts of a peace officer.

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77. Cf. Warner, The Uniform Arrest Act, 28 Va. L. Rev. 316 (1942).

78. Cf. Warner, supra note 77 at 330-31.

These terms convey commonly recognized meanings. "Resisting" or "resistance" means "withstanding the force or effect of" or the "exertion of oneself to counter act or defeat."[79] "Obstruct" means "to be or come in the way of."[80] These terms are alike in that they imply some physical act or exertion. Given a reasonable and natural construction, these terms do not proscribe mere argument with a policeman about the validity of an arrest or other police action, but proscribe only some physical act which imposes an obstacle which may impede, hinder, interrupt, prevent, or delay the performance of the officer's duties, such as going limp, forcefully resisting arrest or physically aiding a third party to avoid arrest.[81]

The statute further requires that the person resists or obstructs "knowingly" and that the officer be in the performance of an "authorized act within his official capacity." The term "knowingly" is specifically defined in the

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79. Webster, New International Dictionary n. 1 & 2 (3d ed. 1964, Unabridged).

80. Webster, New International Dictionary n. 2 (3d ed. 1964, Unabridged).

81. Cf. In Re Bacon, 49 Cal. Rptr. 322, 333 (1st Dist. 1966).

Criminal Code.[82] It considerably narrows the scope of the enactment by exempting innocent or inadvertent conduct from its proscription. The term "authorized act," although not specifically defined in the Code, is not so obscure that men of common intelligence would differ as to its import. "Authorize" is defined as "to endow with authority or effective legal power, warrant, or right."[83] In the context of the statute the phrase "authorized act," given a reasonable and natural construction, means, the legal or legally effective acts of an officer.[84]

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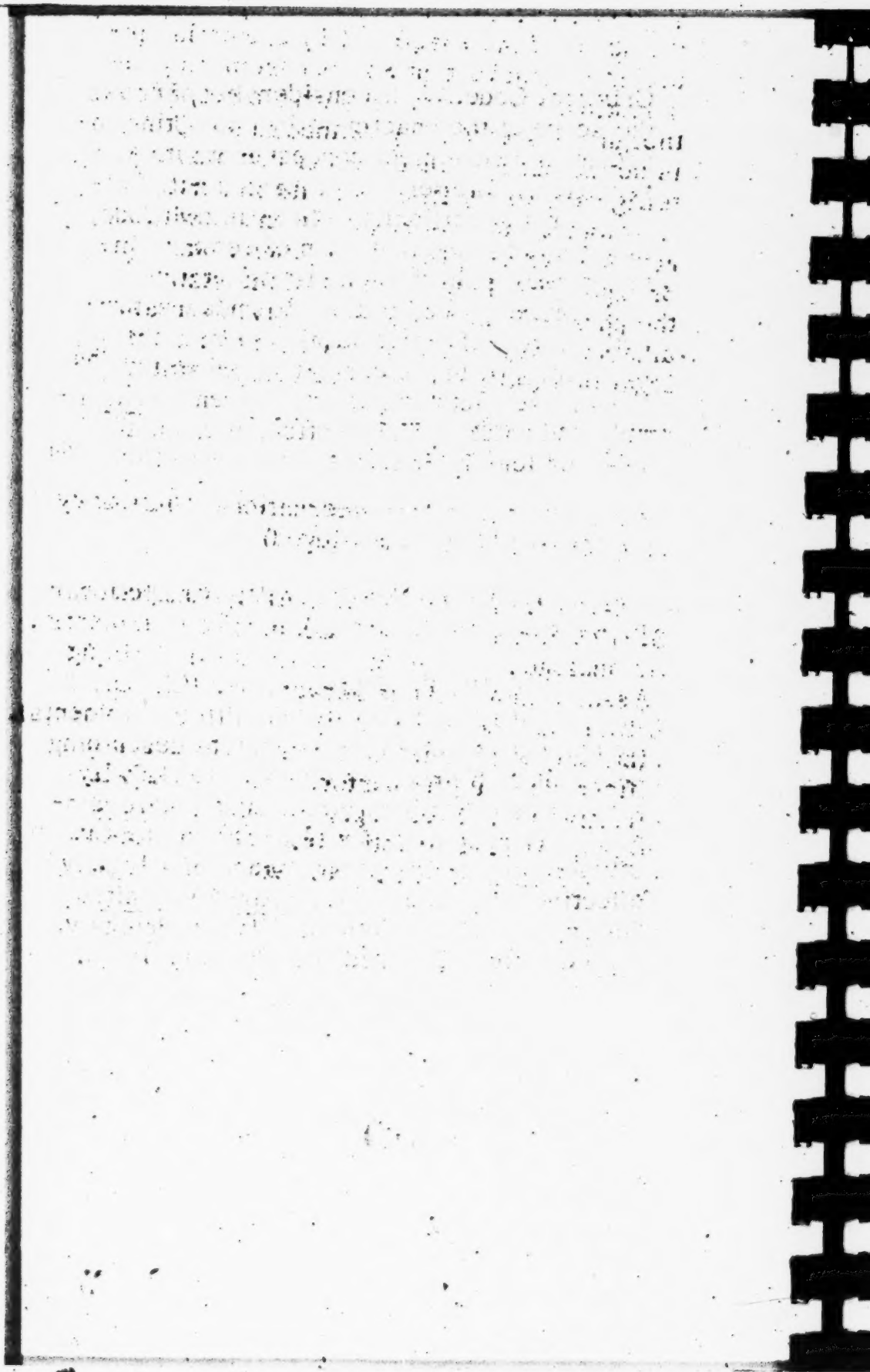
82. See note 72 supra.

83. Webster, New International Dictionary n. 4 (3d ed. 1964, Unabridged).

84. Cf. Ill. Rev. Stat., Ann., Ch. 38, § 31-1 (Smith-Hurd 1964) (Committee Comments). An analogous United States statute describing "Assault on a Process Server," 18 U.S.C. § 1501, has been similarly construed to prohibit only resistance or obstruction of a law officer while in the performance of a legally effective act. See, e.g., Sparks v. United States, 90 F.2d 61 (6th Cir. 1937); Briggs v. United States, 24 F.2d 961 (9th Cir. 1924).



This phrase thus narrows the scope of the offense still further to include only resistance or obstruction of the legal acts of police and other officers.[85] For instance, resistance to an illegal search and seizure would not be proscribed.

Nevertheless, plaintiffs contend that the statute permits police to exercise wholly arbitrary and capricious discretion in regard to group assemblies. Under the language of this statute, they argue, a peace officer need only decree on the spot that the most peaceful assembly be broken up and any failure on the part of a citizen to comply with such an order subjects him to the penalties of this statute. They contend that the in terrorem effect on the right of peaceful assembly arising from the potential misapplication of this statute requires, therefore, that it be declared unconstitutional.

This argument is unpersuasive for two reasons. First, the plaintiffs have not given the statute a reasonable construction. It does not proscribe resisting or obstructing an unlawful act of a peace officer. The guilt

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85. There is an exception to this rule in another section of the Illinois Criminal Code. If the act which is resisted or obstructed is the making of an arrest, a private person is not authorized to resist such arrest with force even though he knows the arrest is unlawful. See Ill. Rev. Stat., Ch. 38, § 7-7

or innocence of the defendant specifically depends on the validity of the officer's act. Therefore, if a policeman erroneously, capriciously, or arbitrarily orders peaceful demonstrators to disperse, acts of resistance or obstruction by the demonstrators would not subject them to criminal liability under this provision.

Second, the basis of plaintiffs' argument is not the scope of the enactment, but is possible misapplication. The constitutionality of a statute, however, is not dependent on its susceptibility of misapplication. For every statute is susceptible of abuse, misuse or misapplication. Rather, its validity depends on whether the language of the statute, given its normal meaning, is so broad that it intrudes upon Constitutional rights.[86] If the language is so broad that its sanctions may be applied indiscriminately to constitutionally protected conduct, as well as to conduct which may properly be proscribed, it violates substantive due process and, therefore, is unconstitutional.

The instant statute, however, does not contain such overreaching language. While admittedly, like any statute, it may be misapplied,

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(1967). See, also, Ill. Rev. Stat., Ann., Ch. 38, § 31-1 (Smith-Hurd 1964) (Committee Comments.)

86. See authorities cited notes 41-43, supra and accompanying text.

its sanctions apply only to knowing physical resistance or obstruction of a valid act of a peace officer. These sanctions, therefore, do not ultimately depend on the subjective views of those charged with its enforcement. Consequently, we conclude that it is neither vague nor overbroad.

THE INTIMIDATION STATUTE

Plaintiffs further attack the Illinois Intimidation Statute, Ill. Rev. Stat., Ch. 38, § 12-6. Although none of the plaintiffs currently face prosecution under this provision, they contend that it has a chilling effect on their exercise of First Amendment freedoms of speech, assembly, and petititon, by reason of its vagueness and overbreadth. They fear that it will be used to punish them for threatening to engage in "direct action and protest activities" if political, economic, and social institutions do not meet their demands for an end to racial discrimination.

The statute provides:

(a) A person commits intimidation when, with intent to cause another to perform or to omit the performance of any act, he communicates to another a threat to perform without lawful authority any of the following acts:

(1) Inflict physical harm on the person

threatened or any other person or on property; or

(2) Subject any person to physical confinement or restraint; or

(3) Commit any criminal offense; or

(4) Accuse any person of an offense; or

(5) Expose any person to hatred, contempt or ridicule; or

(6) Take action as a public official against anyone or anything, or withhold official action, or cause such action or withholding; or

(7) Bring about or continue a strike, boycott or other collective action.

(b) Penalty . . . .

The statute is a section of the Illinois Criminal Code of 1961. According to a revisor's note, it replaces eighteen sections of the prior criminal code which proscribed an array of activities by private persons and public officials.[87] The Illinois Supreme and

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87. See Ill. Rev. Stat., Ch. 38, §§ 240-246, 376-383, 456-464 (1960 repealed).

Appellate Courts have not had occasion to construe the statute, and in the posture of this case, we are without benefit of a lower state court's construction. Under these circumstances, we must again place our own construction upon it, giving words their reasonable and natural meaning.

This statute is an omnibus provision designed to prohibit all manner of threats and unlawful communications intended to compel a person to act against his will.[88] The State of Illinois unquestionably has a legitimate interest in protecting persons from coercion by threats, even deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.[89]

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88. It is supplemental to other sections of the Criminal Code of 1961, which proscribe theft by means of threat, Ill. Rev. Stat., Ch. 38, §§ 16-1, 16-3 (1967), deceptive practices, Ill. Rev. Stat., Ch. 38, § 17-1 (1967), and official misconduct, Ill. Rev. Stat., Ch. 38, § 33-3 (1967). The latter, more specific statutes cover the common law crimes of extortion and blackmail.

89. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949). See, also, Cox v. Louisiana, 379 U.S. 559, 563 (1963); Fox v. Washington, 236 U.S. 273, 277 (1915); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

However, at the outset of this analysis it should be recognized that Illinois has no legitimate interest in proscribing as intimidation statements that have no reasonable tendency to coerce or statements which, although alarming, are not expressions of an intent to act.

Legitimate political expression intended to secure changes in a society's legal, political, social, or economic structure frequently takes the form of expressions about future events or conditions. Such expression may be in the form of promises, predictions or warnings, or threats of lawful action.

While we doubt that threats of the character proscribed by the Illinois Intimidation statute are legitimate forms of expression, the point at which legitimate expression becomes coercive expression of unlawful intent is not easily determined, especially in the heat of public debate. The freedoms of expression, however, are extremely vulnerable to excessive restriction. "The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."[90] The necessity for such "breathing

90. N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963). See also, New York Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964); Cantwell v. Connecticut, 310 U.S. 296, 311 (1940).

space" requires that only threats of substantial evil be proscribed.[91]

The elements of the offense of intimidation are set forth in paragraph (a). Seven subparagraphs specify various acts which may not be threatened if the elements of paragraph (a) are met.

There are three elements of the offense of intimidation defined in paragraph (a) of § 12-6. First, there must be a threat to perform without lawful authority one of the acts specified in the statute. Second, there must be a communication of the threat to another, not necessarily the person threatened. Third, there must be an accompanying intent to cause another to perform or omit the performance of an act.

The term "threat" has a sinister and well-defined meaning in common parlance and in the law. It is "the expression of an intention to inflict evil or injury on another.[92] It is

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91. See, e.g., Dennis v. United States, 341 U.S. 494, 507-510 (1951); Martin v. Struthers, 319 U.S. 141, 143-144 (1943); Schneider v. State, 308 U.S. 147, 161 (1939).

92. Webster, New International Dictionary, n la (3d ed. 1964, Unabridged).

more than a mere expression of such an intent; it is "a menace; especially, any menace of such a nature and extent as to unsettle the mind of the person on whom it operates, and to take away from his acts that free and voluntary action which alone constitutes consent."[93] It is not the abstract meaning of words that constitute an expression a threat, but their reasonable tendency under the circumstances to place another in fear that the threatmaker will perform the threatened act. An innocent expression may be threatening because of the ominous circumstances in which it is made. Similarly, a statement that is literally a declaration of intent to do harm to another is not a threat if the context negatives any reasonable apprehension that the speaker intends what he says he intends.

Implicit in the word "threat," as it is used in a criminal statute, is this requirement: that the expression in its context have a reasonable tendency to create apprehension that its originator will act according to its tenor.

The statute does not prohibit every threat communicated with the required intent, but only those to perform "without lawful authority"

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93. Black, Law Dictionary (4th Ed. 1951).

94. See Moore v. People, 69 Ill. App. 398, 401 (1896).

any of seven specified act. "Authority" is defined as "legal or rightful power; a right to command or to act; power exercised by a person in virtue of his office or trust; dominion; jurisdiction; authorization."[95] In the broad sense of this definition lawful authority is the legal right or power to act. In the narrow sense it is the official power or jurisdiction to act.

The private citizen has lawful authority in the broad sense to perform most of those acts specified in the Illinois Intimidation statute under certain circumstances. He is sometimes justified in using force against another,[96] or in physically restraining another.[97] He has the power to initiate criminal prosecution against another and the right to give information and testimony against another. He may make statements injurious to another's reputation, provided he does not commit defamation. He may engage in collective action in all save a few forms.

If "lawful authority" is confined to the narrow meaning of official power conferred by law, the private citizen, by definition

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96. See Ill. Rev. Stat., Ch. 38, Art. 7 (1967).

97. See Ill. Rev. Stat., Ch. 38, §§ 7-6, 7-9, 10-3 (1967).

a person without official power, has no "authority" to perform any of the acts specified in the intimidation statute. Placing such a meaning on the phrase "lawful authority" in the statute would result in an unreasonable and unnatural construction. Such a construction would make criminal the threat to do lawful acts, including acts expressly permitted by the Criminal Code, in the most legitimate circumstances. It would, for example, make criminal a threat to use justified force in defense of person or property and a threat to file legitimate criminal charges.

Given a reasonable and natural construction, the statute prohibits only threats to do any of the specified acts if the doing of that act would be unlawful considering the circumstances existing when the threat is made and giving effect to the qualifications contained in the threat. The phrase "without lawful authority" is not limited to criminal illegality; an act without lawful authority may be either a crime or a tort, or both. The statute therefore refers to some of the provisions of Illinois criminal and civil law. In this respect the offense of intimidation resembles the inchoate offenses of solicitation, conspiracy, and attempt, which refer to other provisions of the criminal law.[98]

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98. See Ill. Rev. Stat., Ch. 38, Art. 8 (1967).

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Since the statute incorporates some of the provisions of criminal and civil law, all the defenses that would have been available to the accused if he had carried out his threat and had been prosecuted or sued for doing so are available to him in a prosecution for intimidation.[99] This is implicit in the statute and consistent with that section of the Illinois Criminal Code which provides: "It is a defense to charge of solicitation or conspiracy that if the criminal object were achieved the accused would not be guilty of an offense." Ill. Rev. Stat., Ch. 38, § 8-3 (1967).

The remainder of paragraph (a) requires little interpretation. The required state of mind is an intent to cause another to act or refrain from acting by inducing fear that the threat will be carried out if he does not act or refrain. The required communication may be by any means.

Subparagraph (a)(1) prohibits threats to "inflict physical harm on the person threatened or any other person or, on property /without lawful authority/." The infliction of physical harm on another or on property is always unlawful, unless it is justified in defense of person or property or in pro-

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99. There is an obvious exception. He could not defend on the ground that performance of the threatened act was impossible because of some fact unknown to the person threatened. Cf. Ill. Rev. Stat., Ch. 38, § 8-4(b) (1947).

tection of public health, safety, welfare or morals. The situations in which force may be used against another are defined in the Criminal Code.[100] It is readily apparent, therefore, that a threat to inflict physical harm on another or on property, when communicated with intent to coerce, would violate the intimidation statute unless the use of the force threatened would be justified. Similarly, it cannot be said that threats of physical harm to person or property are an insubstantial evil. Indeed, principles of individual liberty require that persons be protected from the apprehension engendered by such threats. This provision, therefore, is neither vague nor overbroad.

Subparagraph (a)(2) makes criminal threats to "subject any person to physical confinement or restraint [without lawful authority]." The limits of lawful authority to confine and restrain another are found in the law governing criminal procedure, the law of guardian and ward, domestic relations law, and certain health laws. The private citizen is seldom justified in restraining another.[101] It is thus apparent that unless such justification exists, or

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100. See Ill. Rev. Stat., Ch. 38, §§ 7-6, 7-9, 10-1, 10-2, 10-3 (1967).

101. See Ill. Rev. Stat., Ch. 38, §§ 7-6, 7-9, 10-1, 10-2, 10-3 (1967).

would exist if the qualifications in the threat were given effect, a threat to restrain or confine another is intimidation. This proscription is obvious to men of common intelligence.

Likewise, it is not overreaching. Threats of false imprisonment or unlawful restraint pose a substantial evil which the state has a legitimate interest in preventing. Given its reasonable and natural construction, the phrase "without lawful authority" excepts threats to restrain in situations where the law recognizes justifiable restraint. This provision's scope, therefore, is narrow and precise.

Subparagraph (a)(3) prohibits threats to "commit any criminal offense." The qualifying phrase, "without lawful authority," is redundant as applied to this subparagraph, since a criminal offense, by definition cannot be committed with lawful authority. The word "offense" is defined in the Illinois Criminal Code as meaning "a violation of any penal statute of this state."[102] Consequently, the subparagraph makes criminal threats to violate any Illinois statute imposing a penalty. The addition of the adjective "criminal" does not narrow

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102. See Ill. Rev. Stat., Ch. 38, § 2-12 (1967).

the meaning of this provision.

The provision is not vague. It is, however, overbroad since it prohibits threats of insubstantial evil. The commission of criminal offenses against persons or property is a substantial evil, and the state may legitimately proscribe the making of threats to commit such offenses. The commission of offenses against public order only, however, is not such a substantial evil that the state may prohibit the threat of it. Subparagraph (a)(3) proscribes threats to violate any penal statute. It therefore makes criminal threats such as the following: (1) threats by dissentient groups to engage in disorderly conduct.[103] threats by residents of a high-crime neighborhood to carry concealed weapons for their own protection,[104] and threats by mothers to block a dangerous state highway to demonstrate the need for increased safety measures.[105] Indeed, the phrase "commit any criminal offense" is so broad as to include threats to commit misdemeanors punishable by fine only. These evils are not so substantial that the state's interest in prohibiting the threat of them outweighs the public interest

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103. See Ill. Rev. Stat., Ch. 38, § 26-1 (1967).

104. See Ill. Rev. Stat., Ch. 38, § 24-1(4) (1967).

105. See Ill. Rev. Stat., Ch. 95 1/2, § 197 (1958).

in giving legitimate political discussion a wide berth.

Since the language of subparagraph (a)(3) is an overbroad restriction on freedom of speech, it is invalid. Obviously, however, if the threat is carried out, the persons who violate the criminal law by their acts are subject to punishment. Therefore, we hold only that making it an offense to threaten to commit any crime, no matter how minor or insubstantial, is an unwarranted limitation.

Subparagraph (a)(4) prohibits threats to "accuse any person of an offense /without lawful authority/." "Accuse ... of an offense" has both a technical and a non-technical meaning. In its technical sense it means "to bring a formal charge . . . before a court or magistrate having jurisdiction to inquire into the alleged crime."106 In its non-technical sense it means to make allegations that another has committed an offense. Such an allegation made only in the presence of the person accused would not be coercive, and a threat to unlawfully publish such an allegation would fall within subparagraph (a)(5). For these reasons, we believe the phrase should be given its technical meaning in subparagraph (a)(4).

The filing of a criminal charge against another is "without lawful authority" only if

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106. Black, Law Dictionary (4th ed. 1951).

the person accused is innocent of the charge and the accuser acts with malice and without probable cause to suspect that the accused committed the crime.[107] The threat to accuse another of an offense violates the intimidation statute only if the person threatened is innocent and the threat-maker, at the time he communicates the threat, had no reasonable grounds for his suspicion. Malice can be inferred from the threat-maker's intent to coerce another by inducing a fear of prosecution.

This provision is neither vague nor overbroad. It clearly proscribes only threats of false, malicious, and unfounded prosecution. Such threats are well outside the ambit of protected speech.

Subparagraph (a)(5) makes criminal threats to "expose another to hatred, contempt or ridicule /without lawful authority/." This phrase is taken from the definition of libel and slander.[108] The exposure of another to hatred, contempt or ridicule is unlawful when it constitutes libel, slander, invasion of privacy, or criminal libel. In.

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107. See Cowper v. Vannier, 20 Ill. App. 2d 499, 500-01 (1959).

108. See New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964).

a prosecution for violation of this subparagraph the state would be required to prove, in addition to the other elements of the intimidation statute, that the threat-maker's execution of his threat would have constituted one of those torts or crimes given his state of mind and the circumstances existing at the time the threat was made. For example, if the person whose exposure was threatened were a public official and the threatened statements related to his official conduct, the state would be required to prove that the threat-maker knew the statements were false or did not know whether they were true or false.[109] This subparagraph is neither vague nor overbroad. It proscribes threats to defame and certain threats to invade privacy. Considering federal constitutional limitations on the law of libel and slander, particularly where public officials are concerned, such threats are not protected. Nor is their protection essential to the protection of legitimate political expression.

Subparagraph (a)(6) prohibits two forms of threats. First, it prohibits threats to "take action as a public official against anyone or anything, or withhold official action /without lawful authority/." The Illinois Criminal Code defines "public officer" as "a person who is elected to office pursuant

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109. See New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964).

to statute, or who is appointed to an office which is established, and the qualifications and duties of which are prescribed by statute, to discharge a public duty for the State or any of its political subdivisions,"[110] and defines "public employee" as "a person, other than a public officer, who is authorized to perform any official function on behalf of, and is paid by, the State or any of its political subdivisions."[111] In using the term "public official" in the intimidation statute, the legislature apparently intended to reach both public officers and public employees. This construction of the term "public official" is consistent with the definition of "official" in the Criminal Code's article prohibiting civil rights violations.[112] Consistent with these definitions, the term "official action" must be construed to mean any governmental action, ministerial as well as discretionary. The subparagraph therefore prohibits any threat made by a public officer or employee to take or withhold governmental action.

Second, the subparagraph prohibits threats to "cause /without lawful authority/ such action or withholding, "/S/uch action or withholding" refers to a public officer's or public

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110. Ill. Rev. Stat., Ch. 38, § 2-18 (1967).

111. Ill. Rev. Stat., Ch. 38, § 2-17 (1967).

112. See Ill. Rev. Stat., Ch. 38, § 13-1(c) (1967).

employee's taking or withholding of governmental action. The verb "cause" when used to define the intent element of the offense of intimidation has a definite meaning. Its context there gives it an active, positive connotation. Similarly, when used in subparagraph (a)(6) to define one of the acts which may not be threatened, its meaning is certain. It has an active, positive connotation to effect, to compel, to take action, to bring about.

The state has a legitimate and substantial interest in precluding public officials or persons purportedly influential with public officials from threatening official action or the withholding thereof for the purpose of inducing the person threatened to take some action desired by the public official or one purporting to have influence with a public official. Nor, as we have indicated, are threats generally within First Amendment protection.

In our reading of this subparagraph, we do not interpret it to include threats by one public official or employee to another, but rather only threats by public officials or persons associated with them to individuals outside the area of government who are unable to protect themselves from abuse of official authority or power and may therefore be coerced or intimidated by such threats.

In the light of all of the foregoing, we conclude that subparagraph (a)(6) is valid.

Subparagraph (a)(7) makes criminal threats to "bring about or continue a strike, boycott or other collective action /without lawful authority/." While the terms "bring about" and "collective action" are not crystal clear, they are not so vague and indefinite that persons of normal intelligence will have difficulty in understanding their meaning. The remaining language of the subparagraph is quite clear. It prohibits threats to unlawfully continue strikes or boycotts. It is unlawful to continue a strike or boycott only if the strike or boycott is unlawful. They are unlawful in certain circumstances by virtue of the National Labor Relations Act,[113] state labor statutes, and state and federal trade regulation laws. They also may be unlawful because of the means by which they are pursued.

Prohibiting the use of threats to cause or continue unlawful strikes, boycotts or similar action in order to coerce or intimidate persons to perform or omit the performance of acts which the person threatening desires to have performed or omitted is within the police power of the state. Nor is such a threat within First Amendment protection.

We recognize that the conclusion of validity may inhibit the making of threats which some persons may deem desirable, e.g., the threat

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113. 29 U.S.C.A., §§ 151 et seq.

of a teachers' strike which would be an unlawful strike under Illinois law. We do not determine that the subparagraph in question would even be applicable to such a threat. Nor do we seek to determine its constitutionality under any and all circumstances. We hold simply that given a legitimate state interest, statutory language understandable by persons of common intelligence and no impingement on protected activity, the provision is valid. Its possible unconstitutional application in a given factual situation we leave to that case when and if it ever arises.

Amici curiae have argued that the statute generally is impermissibly vague because it refers to other provisions of criminal and civil law that may be vague. The reference to other provisions of criminal and civil law is not for the purpose of explaining vague language in the instant statute,[114] but for the purpose of defining the acts which may not be threatened. The argument advanced by amici curiae would deny the state the power to prohibit intimidation and the inchoate offenses except by a compendious statute. This is neither practical nor constitutionally required.

We recognize that the intimidation statute does not furnish a definite standard to the

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114. Cf. Kevishian v. Board of Regents, 385 U.S. 589, 604 (1967).

extent that the provisions of criminal and civil law referred to may be vague. The constitutional infirmity resides in those provisions, however, not in the intimidation statute, and the proper remedy is clarification or invalidation of them.

CONCLUSION

In conclusion, a few general observations which are relevant to our opinion and decision here should be made explicit although they are implicit therein.

First, a presumption of validity attaches to legislative enactments.[115]

Second, if the normal and natural construction of statutory language or even a narrow interpretation thereof will preserve the constitutionality of a statute, it must be sustained.[116]

Third, only if the statutory language is so vague and indefinite that men of common

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115. See, e.g., Goldblatt v. Town of Hempstead, 369 U.S. 590, 595-96 (1961); Flemming v. Nestor, 363 U.S. 603, 611 (1960); Sabel v. Adams, 208 F. Supp. 316, 324 (S.D. Fla. 1962).

116. See, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Cox v. New Hamp-

intelligence will not be able to understand it and regulate their conduct accordingly, or if in its normal and natural meaning it is overbroad and proscribes conduct constitutionally protected, may it be held unconstitutional and void.[117]

Fourth, the fact that a statute may be misapplied, misused, or abused does not render the statute invalid; self-enforcing or foolproof laws have not yet been invented.

Fifth, the interpretation of a state statute by a lower federal court is not necessarily binding on the state courts, though the two sections of the Illinois Criminal Code which we have found to be invalid appear to us to be clearly unconstitutional.

Finally, we would make two related observations. The declaration of validity and constitutionality here made with respect to the various statutes is predicated on the construction and interpretation of each set forth herein. To the extent that the state courts may make other and broader interpretations

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shire, 312 U.S. 569 (1941); Cf. Harris v. United States, 347 U.S. 612 (1954).

117. See authorities cited notes 38-43 supra and accompanying text.

or constructions, the holdings here would necessarily be subject to reexamination.

Conversely, we recognize that while we have held these statutes to be valid as we construe and interpret them, their application in specific instances may give rise to further constitutional questions. No declaratory judgment as to the constitutionality of a statute can anticipate and determine all future cases which may arise thereunder. We have endeavored to delineate guidelines of construction and interpretation which balance the legitimate interest and duty of the state to preserve the peace, and the constitutionally protected rights of free speech, peaceful assembly and peaceful demonstration guaranteed by the First Amendment to every citizen. Inevitably, in practical application, further questions will arise.

Judgment will be entered in accordance with the declarations and conclusions reached herein.

JUDGMENT ORDER

The above cause came on regularly for hearing before the Court on January 27, 1968, and was duly submitted for consideration and decision, and the Court on 1st day of March, 1968, made its decision, and filed its memorandum opinion. Now, therefore, pursuant thereto,

IT IS HEREBY ORDERED AND DECREED

BY THE COURT AS FOLLOWS:

1. That sub-section (a)(2) of Ill. Rev. Stat., ch. 38, § 25-1 (1967), which defines and proscribes the penal offense of "Mob Action" is hereby declared unconstitutional, null, and void in that it violates the due process clause of the Fourteenth Amendment of the Constitution of the United States.

2. That the remainder of Ill. Rev. Stat., ch. 38, § 25-1 (1967), which defines and proscribes the penal offense of "Mob Action" and which fixes the penalties therefor, is consistent with the due process clause of the Fourteenth Amendment of the Constitution of the United States and therefore valid.

3. That Ill. Rev. Stat., ch. 38, § 31-1 (1967), which defines and proscribes the penal offense of "Resisting or Obstructing a Peace Officer" and fixes the penalty therefor is consistent with the due process clause of the Fourteenth Amendment of the Constitution of the United States and valid.

4. That sub-section (a)(3), of Ill. Rev. Stat., ch. 38, § 12-6 (1967), which defines and proscribes the penal offense of "Intimidation" is hereby declared unconstitutional, null and void in that they violate the due process clause of the Fourteenth Amendment of the Constitution of the United States.

5. That the remainder of Ill. Rev. Stat., ch. 38, § 12-6 (1967), which defines and proscribes the penal offense of "Intimidation" and which fixes the penalty thereon is consistent with the due process clause of the Fourteenth Amendment of the Constitution of the United States and therefore valid.

6. The Court retains jurisdiction of this action to determine the other claims raised in the complaint and to render additional relief if necessary.

Dated at Chicago, Illinois, this 1st day of March, 1968.

John S. Hastings,
United States Circuit Judge.

Julius J. Hoffman,
United States District Judge.

Herbert L. Will,
United States District Judge.

IN THE UNITED STATES DISTRICT COURT

(Title Omitted)

DECREE FOR PERMANENT INJUNCTION

This cause having come on to be heard by a Three-Judge Court pursuant to 28 U.S.C. 2281 and 2284, counsel for the plaintiffs and defendants having been fully heard, and the Court having examined the briefs filed by the respective parties, and having filed herein its findings of fact, conclusions of law and declaratory judgment on March 4, 1968, declaring that ch. 38, § 25-1(a)(2), and ch. 38 § 12-6(a)(3), Ill. Rev. Stat. 1967, are unconstitutional and void, and having directed that judgment be entered in accordance therewith; now therefore, by reason of the law and findings aforesaid.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendants, their employees, servants, and agents, be and they are hereby perpetually enjoined and restrained from the enforcement of or the prosecution under ch. 38, § 25-1(a)(2) and ch. 38, § 12-6(a)(3), Ill. Rev. Stat. 1967, said sub-sections having been declared unconstitutional and void.

Dated this 2nd day of April, A.D. 1968.

Enter:

John S. Hastings,
Julius Hoffman,
Hubert Will,

Judges of the United States
District Court, Northern
District, Eastern Division.

IN THE UNITED STATES DISTRICT COURT

(Title Omitted)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that John S. Boyle, Chief Judge of the Circuit Court of Cook County, Illinois, John J. Stamos, State's Attorney of Cook County, Illinois, Joseph I. Wood, Sheriff of Cook County, Illinois, Maurice W. Lee, Magistrate, Circuit Court of Cook County, Illinois, and John J. Limperis, Magistrate, Circuit Court of Cook County, Illinois, defendants herein, hereby appeal to the Supreme Court of the United States from that portion of the Decree for Permanent Injunction, entered April 2, 1968, which perpetually enjoins and restrains the aforesaid defendants from the enforcement of or the prosecution of the said Chapter 38, § 12-6 (a)(3), Illinois Revised Statutes, 1967, said sub-section having been declared unconstitutional and void.

II. This appeal is taken pursuant to 28 U.S.C. § 1253.

Edward J. Hladis,
500 Chicago Civic Center
Chicago, Illinois 60602,
Chief of the Civil Division, Office of State's Attorney of Cook County, Illinois, Attorney for John S. Boyle, John J. Stamos, Joseph I. Wood, Maurice W. Lee and John J. Limperis.

IN THE UNITED STATES DISTRICT COURT

(Title Omitted)

NOTICE OF CROSS-APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Lawrence Landry, Rommell Muller, Joseph H. Reynolds, David A. Reynolds, James Washington, Frank Ditto, Robert Lucas, Robert Brown, Michael Rogers, Bernard Hughes, Arnold Ford, Vissa Marie Turner, Wysingo Turner, Andrew Brown, Charles Fletcher, James Jones, Herman Townsend, Jerome Parker, Rudy Hooper, and Act, an unincorporated association, hereby cross-appeal to the Supreme Court of the United States, from that portion of the decretal order, entered pursuant to memorandum opinion on March 4, 1968, by the United States District Court for the Northern District of Illinois-Eastern Division, which denied injunctive relief, by declaring all, provisions of Ill. Rev. Stats., Ch. 38, Sec. 25-1 (1967), which proscribes the penal offense of "Mob Action," valid, except sub-section (a)(2) thereof; declaring, Ill. Rev. Stats., Ch. 38, Sec. 31-1 (1967), proscribing the penal offense of "Resisting or obstructing a Peace Officer," valid; and declaring all provisions of Ill. Rev. Stats., Ch. 38, Sec. 12-b (1967), which proscribes the penal offense of "Intimidation," valid, except sub-section (a)(3) thereof.

This cross-appeal is taken pursuant to the provisions of Title 28, U.S. C., Sec. 1253.

Robert L. Tucker
30 North LaSalle Street
Chicago, Illinois 60602
Telephone: 236-8624
Attorney for all Plaintiffs

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

(Title Omitted)

COMPLAINT

The plaintiffs by their Complaint allege as follows:

1. This is a class action brought by the Plaintiffs pursuant to Rule 23(a), (1), (3), of the Federal Rules of Civil Procedure on their own behalf and on behalf of all others similarly situated. Plaintiffs and others similarly situated comprise one class, and certain of these Plaintiffs also bring this action on their own behalf and on behalf of all others similarly situated as Sub-Class One. Certain other Plaintiffs bring this action on their own behalf and on behalf of all others similarly situated as Sub-Class Two. Certain other Plaintiffs bring this action on their own behalf and on behalf of all others similarly situated as Sub-Class Three. Certain other Plaintiffs bring this action on their own behalf and on behalf of all others similarly situated as Sub-Class Four. Certain other Plaintiffs bring this action on their own behalf and on behalf of all others similarly situated as Sub-Class Five. Certain other Plaintiffs bring this action on their own behalf

and on behalf of all others similarly situated as Sub-Class Six. Certain other Plaintiffs bring this action on their own behalf and on behalf of all others similarly situated as Sub-Class Seven. These seven classes have common claims and they therefore bring this civil action together.

1. Parties.

2. Plaintiffs, Rommell Muller, Joseph H. Reynolds and David A. Reynolds, members of Sub-Class One, are Negro citizens who were arrested on August 1, 1967, in the City of Chicago, Illinois, and were charged with violations of certain statutes of the State of Illinois, to-wit: Ill. Rev. Stats., Ch. 38, Sections 25-1 (a), (1) and (2); and 31-1, and with violations of certain ordinances of the City of Chicago, to-wit: Ch. 11-33; and Ch. 193-1. These Plaintiffs are residents of the City of Chicago, Illinois, and are citizens of the United States. They face criminal prosecution before the Circuit Court of Cook County, Illinois, seated in the City of Chicago. They sue on behalf of themselves and all others similarly situated which class is too numerous to bring before this Court.

3. Plaintiff, James Washington, and other persons, members of Sub-Class Two, are Negro citizens who were arrested on May 21, 1967, in the City of Chicago, Illinois, and are charged

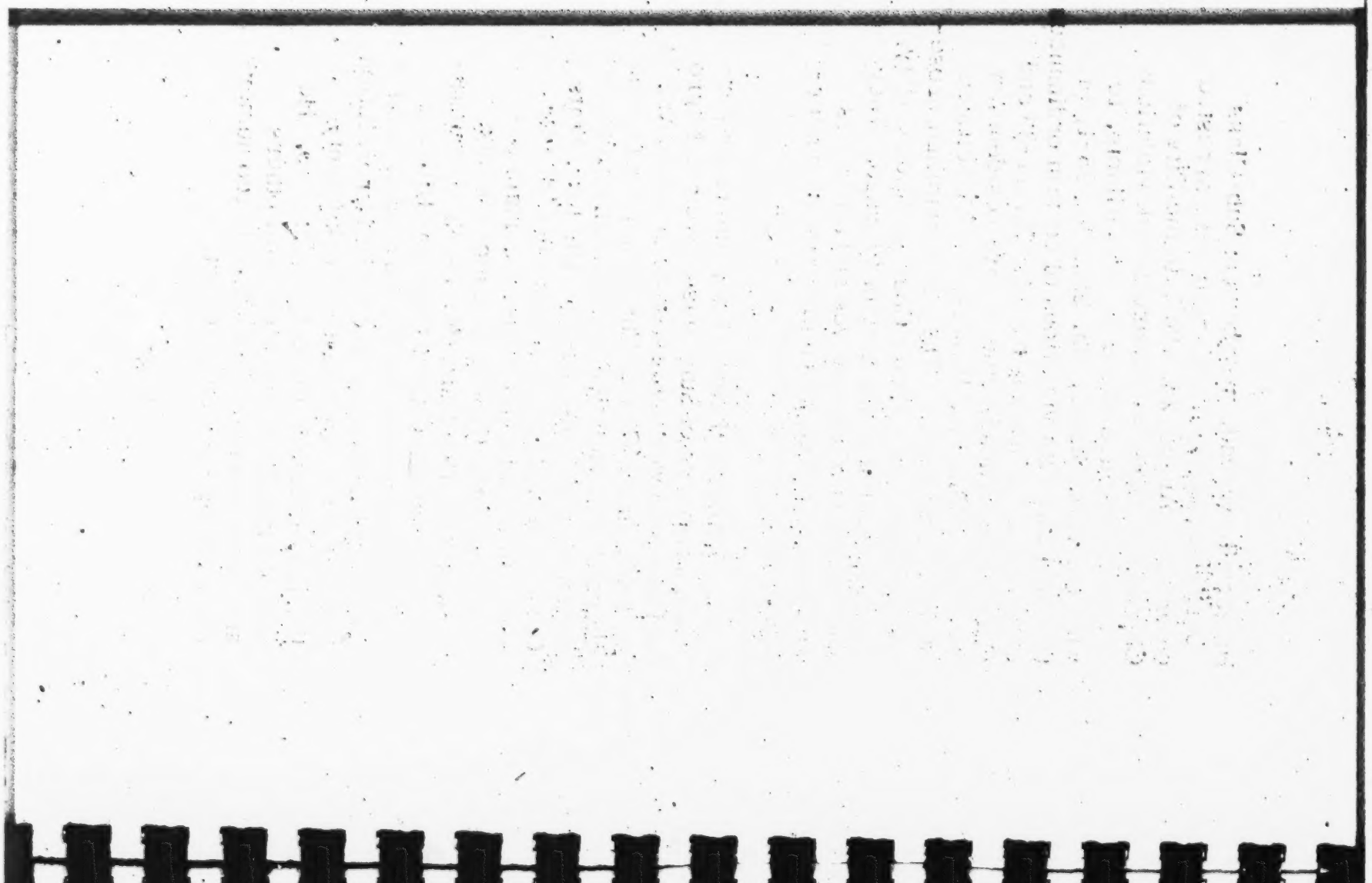
with violations of certain statutes of the State of Illinois, to-wit: Ill. Rev. Stat., Ch. 38, Sections 12(3); 12-4(B)(5); 25-(a)(1) and (2); and 31-1, and with violations of certain ordinances of the City of Chicago, to-wit: Ch. 11-33 and Ch. 193-1. They are residents of the City of Chicago and are citizens of the United States. Plaintiff, James Washington, faces criminal prosecution before the Circuit Court of Cook County, Illinois, seated in the City of Chicago. He sues on behalf of himself and all others similarly situated, which class is too numerous to bring to this Court.

4. Plaintiffs, Jerome Parker, and Rudy Hooper, members of Sub-Class Three, are Negro citizens who were arrested on or about September 14, 1967, in the City of Chicago, Illinois, and were charged with violations of certain statutes of the State of Illinois, to-wit: Ill. Rev. Stat., Ch. 38, Sec. 25-1(a), (1); 31-1, and with violations of certain ordinances of the City of Chicago, to-wit: Ch. 11-33 and Ch. 193-1. These Plaintiffs are residents of the City of Chicago, Illinois, and are citizens of the United States. They face criminal prosecution before the Circuit Court of Cook County, Illinois, seated in the City of Chicago. They sue on behalf of themselves and all others similarly situated, which class is too numerous to bring before this Court.

5. Plaintiffs, Arnold Ford, Bernard Hughes, Vissa Marie Turner, Wysingo Turner, Andrew Brown, Charles Fletcher, James Jones and

Herman Townsend, members of Sub-Class Four, are Negro citizens who were arrested on or about August 23, 1967, in the City of Chicago, Illinois, and charged with violations of certain statutes of the State of Illinois, to-wit: Ill. Rev. Stats., Ch. 38, Sec. 25-1, (a), (1); 31-1 and with violations of certain ordinances of the City of Chicago, to-wit: Ch. 11-33 and Ch. 193-1. These Plaintiffs are residents of the City of Chicago, Illinois, and are citizens of the United States. They face criminal prosecution before the Circuit Court of Cook County, Illinois, seated in the City of Chicago. They sue on behalf of themselves and all others similarly situated which class is too numerous to bring before this Court.

6. Plaintiff, Frank Ditto, and other persons, members of Sub-Class Five are Negro citizens who were arrested on or about August 4, 1967, in the City of Chicago, Illinois, and charged with violations of certain statutes of the State of Illinois, to-wit: Ill. Rev. Stats., Ch. 38, Sec. 25(a), (1), (2); 31-1; 12 (3); and with certain violations of certain ordinances of the City of Chicago, Illinois, to-wit: Ch. 193-1 and Ch. 11-33. They are residents of the City of Chicago, Illinois, and are citizens of the United States. Plaintiff, Frank Ditto, faces criminal prosecution before the Circuit Court of Cook County, Illinois, seated in the City of Chicago. He sues on behalf of himself and all others similarly situated which class is too numerous to bring before this Court.



7. Plaintiff, ACT, its members, associates and supporters all being members of Sub-Class Six, are an unincorporated association, maintaining offices in the City of Chicago, Illinois, whose purpose is to help to secure to all Negro citizens the rights guaranteed to them under the Constitution of the United States, and to end all forms of racial segregation and discrimination in the interest of Negro and white citizens throughout the United States. In support of these purposes ACT, its staff and its supporters engage in all forms of legitimate protest activities, including, but not limited to picketing, demonstrations, rallies, mass meetings, voter registration drives, community organization and publication. ACT seeks to obtain its objectives through the utilization of the fundamental rights of free speech, press and assembly, and the right to petition the government for the redress of grievances.

8. Plaintiffs, Lawrence Landry, Robert Lucas and Robert Brown and Michael Rogers, are members of Sub-Class Seven. They are Negroes, and are representatives of the class of all Negroes in the City of Chicago. They are citizens of the United States. Said class, their members, friends and supporters are currently being intimidated in the exercise of their First Amendment rights through the wholesale use of unconstitutional statutes to prosecute members of the Negro community and to threaten, intimidate, hinder and deter

said First Amendment rights. These Plaintiffs have in fact been intimidated, and are in fact deterred, hindered and prevented from exercising their said First Amendment rights; and particularly their rights of free speech and assembly because of the conduct of the Defendants hereinafter complained of.

9. Members of Sub-Class Seven above described are so numerous that joinder of all of their members herein is impractical. There are questions of law and of fact common to each sub-class; the sub-classes of the named Plaintiffs are typical of the claims of each other sub-class; and the named Plaintiffs will fairly and adequately protect the interests of each class. Defendants have acted on grounds generally applicable to the Plaintiffs in all sub-classes. Therefore, injunctive and declaratory relief is appropriate to the classes as a whole.

II. Defendants

10. Defendant, Richard J. Daley, is a citizen of the State of Illinois and Mayor of the City of Chicago. He is sued individually and in his capacity as Mayor of the City of Chicago, Illinois.

11. Defendant, James Conlisk, is a citizen of the State of Illinois and Superintendent of Police of the City of Chicago, Illinois. He is sued individually and in his capacity as Superintendent of Police of the City of Chicago, Illinois.

12. Defendant, John S. Boyle, is a citizen of the State of Illinois and Chief Judge of the Circuit Court of Cook County, Illinois. He is sued individually and in his capacity as Chief Judge and as representative of the class of judges of the Circuit Court of Cook County, Illinois.

13. Defendant, John J. Stamos, is a citizen of the State of Illinois and State's Attorney of Cook County, Illinois. He is sued individually and in his capacity as State's Attorney of Cook County, Illinois.

14. Defendant, Joseph I. Wood, is a citizen of the State of Illinois and Sheriff of Cook County, Illinois. He is sued individually and in his capacity as Sheriff of Cook County, Illinois.

15. Defendant, Raymond F. Simon, is a citizen of the State of Illinois and Corporation Counsel for the City of Chicago, Illinois. He is sued individually and in his capacity as Corporation Counsel for the City of Chicago.

16. Defendant, Richard J. Elrod, is a citizen of the State of Illinois and an Assistant Corporation Counsel of the City of Chicago in charge of its Division of Ordinance Enforcement.

17. Defendant, Maurice W. Lee, is a citizen of the State of Illinois and Magistrate of the Circuit Court of Cook County, Illinois.

He is sued individually and in his capacity as Magistrate of the Circuit Court of Cook County and as representative of the class of Magistrates of the Circuit Court of Cook County, Illinois.

18. Defendant, John J. Limperis, is a citizen of the State of Illinois and Magistrate of the Circuit Court of Cook County, Illinois. He is sued individually and in his capacity as Magistrate of the Circuit Court of Cook County and as representative of the class of Magistrates of the Circuit Court of Cook County, Illinois.

19. Defendants, John T. Burke, Joseph Ratkvich and Robert Kulovitz are citizens of the State of Illinois and officers of the Police Department of the City of Chicago, Illinois. They are sued individually and in their capacity as officers of the Police Department of the City of Chicago and as representatives of the class of police officers of the City of Chicago.

20. The Defendants herein, under color of certain statutes of the State of Illinois and certain ordinances of the City of Chicago, have purposely entered into a plan or scheme of concerted and joint action with and among themselves and with other persons, some of whom are unknown to Plaintiffs, to subject or cause to be subjected the Plaintiffs, citizens of the United States, to the deprivation of rights, privileges and immunities secured to them by

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the Constitution and laws of the United States.

21. The Defendants, or some of them, have met together, on more than one occasion; they have discussed, formulated, outlined and agreed to a detailed plan and scheme of harassment, arrests, detention, setting of exorbitant and excessive bail, prosecutions, trials, conviction, fines and imprisonment, which detailed plan and program they have agreed to direct against Plaintiffs herein, and other citizens of the United States, members of the same class as these Plaintiffs similarly situated, solely for the purpose of deterring, hindering, preventing and depriving these Plaintiffs of rights, privileges and immunities secured to them by the Constitution and laws of the United States, and more particularly of the First Amendment privileges of speech and assembly. The Defendants, acting together and separately have committed specific acts in furtherance of, and to carry out the above described plan and scheme, as more particularly set forth below:

(a) Defendants, James Conlisk, and Richard J. Elrod, as a result of the above described meetings among Defendants, and formulation of the above described plan and scheme, have been designated by their superiors namely Defendants, Richard J. Daley, and Raymond F. Simon, respectfully

to be the principal persons to implement and carry out the aforesaid plan to deterrence, hindrance, and prevention of the exercise of Plaintiffs' First Amendment privileges of speech and assembly, by designating the occasions, places, manner and method of arrests, as well as the number of Plaintiffs to be arrested; and by actual designation of particular places of detention of particular Plaintiffs as distinguished from other persons arrested in the City of Chicago, Illinois.

(b) Defendants Maurice W. Lee, and John J. Limperis, acting with the other Defendants named herein and by and through the authority of their superiors, have wilfully and unlawfully acted in furtherance of the aforesaid detailed plan and scheme by the wilful and unconstitutional application and imposition of unreasonable and exorbitant bail after Plaintiffs or some of them had been arrested; for the sole purpose of effecting Plaintiffs' unlawful detention; thereby depriving Plaintiffs, or some of them of their liberty and property, without due process of law.

(c) Defendants Richar J. Elrod, and the Defendant John J. Stamos, acting through his subordinates, as State's Attorney of Cook County, have threatened, and actually attempted to set in motion unlawful prosecutions of the Plaintiffs or some of them through the application of these Plaintiffs of the aforesaid statutes of the State of Illinois and ordinances of the City of Chicago, all of which are unconstitu-

tional on their face and/or unconstitutional in their application to the Plaintiffs herein in furtherance of the above described detailed plan; said plan being calculated to deprive the Plaintiffs herein of their privileges, immunities and rights secured to them under the Constitution of the United States.

III. Jurisdiction of the Court

22. The jurisdiction of the Court over the complaint arises under Title 28 U.S.C., Sections 1331, 1332, 1343(3) and (4), 2201, 2202, 2281 and 2284; Title 42 U.S.C., Sections 1981, 1983 and 1985, and the Constitution of the United States and more particularly; the First, Fourth, Fifth, Sixth, Eighth, Tenth, Thirteenth, Fourteenth and Fifteenth Amendments thereto.

23. The amount in controversy, exclusive of interests and costs, exceeds the sum of Ten Thousand Dollars ($10,000).

24. The Defendants herein, under color of certain statutes of the State of Illinois and certain ordinances of the City of Chicago have purposefully entered into a plan or scheme of concerted and joint action with and among themselves and with other persons some of whom are unknown to Plaintiffs, to subject or cause to be subjected the Plaintiffs, citizens of the United States, to the deprivation of rights, privileges and immunities secured to them by the Constitution and laws of the United States.

25. Pursuant to this plan or scheme the Defendants have attempted to threaten and continue to attempt to prosecute the Plaintiffs and all persons associated with them or working in cooperation therewith under color and authority of certain statutes, namely, Ch. 38, Secs. 25(a), (1), (2); Ch. 38, Sec. 31-1; Ch. 38-12-2; 12-4; 12-6; and certain ordinances of the City of Chicago, to-wit: Ch. 193-1 and Ch. 11-33. Said statutes and ordinances are set forth in an Appendix, marked Exhibit "A," and incorporated by reference herein.

26. Further, Defendants, or some of them, without any basis whatsoever in fact, and solely for the purpose of depriving Plaintiffs of their Federally protected rights attempted to institute the prosecution of the Plaintiffs and those associated with them or working in cooperation therewith by arresting certain of the Plaintiffs without any warrants of any kind, without probable cause. That upon so illegally and unconstitutionally arresting Plaintiffs, Defendants then charged Plaintiffs, or some of them, with violations of the aforesaid statutes, ordinances, or some of them.

27. Specifically, on or about the 1st day of August, 1957, Plaintiffs, Rommell Muller, Joseph H. Reynolds and David A. Reynolds, members of Sub-Class One, all being citizens of Chicago, Illinois, and other citizens of the United States and residents of the City

of Chicago, Illinois, did gather and lawfully and peaceably assemble in and upon the public streets of the City of Chicago, Illinois, and more specifically in and upon the sidewalks and public thoroughfares commonly known as 67th Street and Cottage Grove Avenue, Chicago, Illinois, to investigate and peacefully protest against the unlawful shooting and killing of one Julius Woods, a Negro citizen and resident of the same community by a white person, not a resident of said community. The Plaintiffs, and other members of the class, all residents of the City of Chicago, concerned with the shooting of Julius Woods, attempted to ascertain the facts surrounding his shooting and to exercise their First Amendment rights of free speech, assembly, and the right to petition for redress of grievances. These Plaintiffs individually, and other members of the same class while performing the above acts, were arrested pursuant to the aforesaid statutes and ordinances, or some of them, and all held on unreasonable, excessive and exorbitant bail, ranging from Ten Thousand Dollars ($10,000) to Fifty Thousand Dollars ($50,000).

28. On or about the 14th day of September, 1967, Plaintiffs Jerome Parker and Rudy Hooper, and other persons being Negro residents of the City of Chicago, Illinois, and citizens of the United States, did lawfully gather and peacefully assemble in and upon the public streets of the City of

Chicago, and more particularly the sidewalk and public thoroughfares commonly known as 43rd Street and Langley Avenue, Chicago, Illinois, for the purpose of peacefully and lawfully demonstrating and protesting against the unlawful attack and brutal beating of an 18 year old Negro young woman who resided in said community, by police officers of the City of Chicago, which assault and brutal beating of the said 18 year old Negro young woman resulted in her hospitalization, and occurred on or about September 12, 1967. Said Plaintiffs, in so peacefully protesting and demonstrating, were attempting to exercise their First Amendment rights of free speech, assembly and the right to petition for redress and grievances. These Plaintiffs individually, and other members of the same class, while performing the above acts, were arrested pursuant to the aforesaid statutes and ordinances, or some of them, and all held on unreasonable, excessive and exorbitant bail, ranging from Ten Thousand Dollars ($10,000) to Fifty Thousand Dollars ($50,000).

29. On or about May 21, 1967, Plaintiff James Washington, a Negro resident of the City of Chicago, Illinois, and a citizen of the United States, and other Negro residents and citizens of the United States, similarly situated, did lawfully gather and peacefully assemble in and upon the public streets of the City of Chicago and more particularly the sidewalks and public

thoroughfares commonly known as Washington Park; and plaintiff and said persons were so dling for the lawful purpose or urging that the said public park or portion thereof be renamed in order that said park would be rendered more relevant in location and character to the predominant number of Negro residents who reside in the vicinity of said park, and in recognition of a member or members of their own ethnic group similar to the kind of recognition accorded other national and ethnic groups in other parts of the City of Chicago. In so doing Plaintiff and others were in the exercise of their First Amendment rights of free speech, assembly, and while performing the above acts, were arrested pursuant to the abovesaid statutes and ordinances, or some of them, and all held on unreasonable, excessive and exorbitant bail.

30. On or about August 23, 1967, Plaintiffs Arnold Ford, Vissa Marie Turner, Wysingo Turner, Andrew Brown, Charles Fletcher, James Jones, and Herman Townsend, all being members of Sub-Class Four, and Negro residents of the City of Chicago, Illinois, and citizens of the United States, and other Negro residents and citizens of the United States; similarly situated, did lawfully gather and peacefully assemble in and upon the public streets of the City of Chicago, and more particularly the sidewalks and public thoroughfares commonly known as 111th Street and Throop Avenue, Chicago, Illinois, to inquire, investigate and peacefully protest against the

unlawful shooting of another Negro youth and resident of said community. The Plaintiffs and other members of the Class, concerned with the said shooting of another youth, and while so peacefully protesting and demonstrating against said shooting, were attempting to exercise First Amendment rights of free speech, assembly and the right to petition for redress of grievances. The Plaintiffs individually, and other members of the same class while performing the above acts, were arrested pursuant to the aforesaid statutes and ordinances, or some of them and all held on unreasonable, excess and exorbitant bail.

31. On or about August 4, 1967, Plaintiff, Frank Ditto, a Negro resident of the City of Chicago, Illinois, and a citizen of the United States, and other Negro residents and citizens of the United States similarly situated, did lawfully gather and peacefully assemble in and upon a certain playground located in the City of Chicago, Illinois, at 3501 S. Wallace Street, Chicago, Illinois, and said Plaintiffs were lawfully and peacefully in and upon the premises of said public playground, for the lawful purpose of peacefully demonstrating and protesting against the lack and absence of adequate playground facilities in the south side community, in the City of Chicago where they, and their children, all being Negroes, resided. In so doing, plaintiff, Frank Ditto, and other persons similarly situated were attempting to exercise their First Amendment

rights of free speech, assembly and while performing the above described lawful acts, were arrested by the Defendants, or some of them, and charged with violations of the above said statutes and ordinances, or some of them, and held on unreasonable, excessive and exorbitant bail.

32. That the arrests of Plaintiffs, or some of them, and threats or attempts to enforce the aforesaid mob violence and disorderly conduct statutes against Plaintiffs, are not made by the Defendants with any expectation of securing valid convictions but rather are a part of a plan, conceived and implemented by Defendants to employ arrests, seizures of plaintiffs' persons, and their unlawful detention on unreasonable, excessive and exorbitant bail and threats of prosecution under color of the aforesaid statutes to harass Plaintiffs and discourage them and their supporters from asserting and attempting to vindicate the Constitutional rights, particularly of Negro citizens; and the particular tactic in the said plan or scheme, to-wit: the unlawful use of the Illinois Bail Statute, does result in the effective unlawful detention of these Plaintiffs, particularly the Negro residents of the City of Chicago named herein, and accordingly effectively deprives these Plaintiffs of their liberty and property without due process of law and deprives them of rights secured to them under the First, Eighth, and Fourteenth Amendments to the Constitution of the United States.

33. The provisions of Illinois Revised Statutes, Ch. 38, Sections 25-1(a), (1) (2) (3); Ch. 38, Sec. 31-1; Ch. 38, Sec. 12-2; and 12-6, and the said ordinances of the City of Chicago, Ch. 193-1 and Ch. 11-33 (Exhibit "A1), are void and illegal on their face and as applied to the Plaintiffs herein, in that, they violate the Constitution of the United States and in particular the First, Fourth, Fifth, Sixth, Ninth, Tenth, Thirteenth, Fourteenth and Fifteenth Amendments thereto. These statutes and ordinances violate the fundamental guarantees of free speech, press, assembly, and the right to petition the government for redress of grievances. They violate the guarantee of due process by law in that they are vague and indefinite and fail to meet the requirements of certainty in criminal statutes. Statutes and ordinances, or some of them, such as are complained of herein, and in particular, Ill. Rev. Stats., Ch. 38, Sections 25-1 (a), (1)(2) and Chicago Ordinance Ch. 193-1, have been held unconstitutional on their face by other Federal courts, including the Supreme Court of the United States.

34. Pursuant to the aforesaid plan or scheme Defendants have threatened and continue to threaten to enforce the said unconstitutional, void, and illegal statutes and ordinances against the Plaintiffs herein for the sole purpose of harassing, intimidating, subjecting and causing to be subjected Plaintiffs and their members, friends and supporters to the deprivation of rights, privileges, and immunities

secured to them by the Constitution and laws of the United States and, in particular, those guaranteed by the First Amendment.

35. The vast majority of Negro citizens of the City of Chicago, Illinois, and their supporters and friends are law-abiding persons who nevertheless have serious complaints against the administration of justice and the administration of the laws, as herein complained of, their economic deprivation, and the inadequacy of numerous public services relating to schools, housing, and other grievances. The impact of the unconstitutional prosecutions complained of herein, is designed to and has the effect of deterring the Negro community in particular, and their friends and supporters from engaging in an area of activity which is constitutionally protected, because they are fearful of becoming the victims of the unconstitutional and discriminatory law and law enforcement and prosecutive program hereinabove described conducted by the Defendants; and therefore Defendants' conduct has the effect of creating a chill upon the exercise of their rights protected under the First and Fourteenth Amendments of the Constitution of the United States.

36. The prosecution of any Plaintiffs herein will have destructive, harassing and intimidating and chilling effects upon Federal rights described above and in particular those

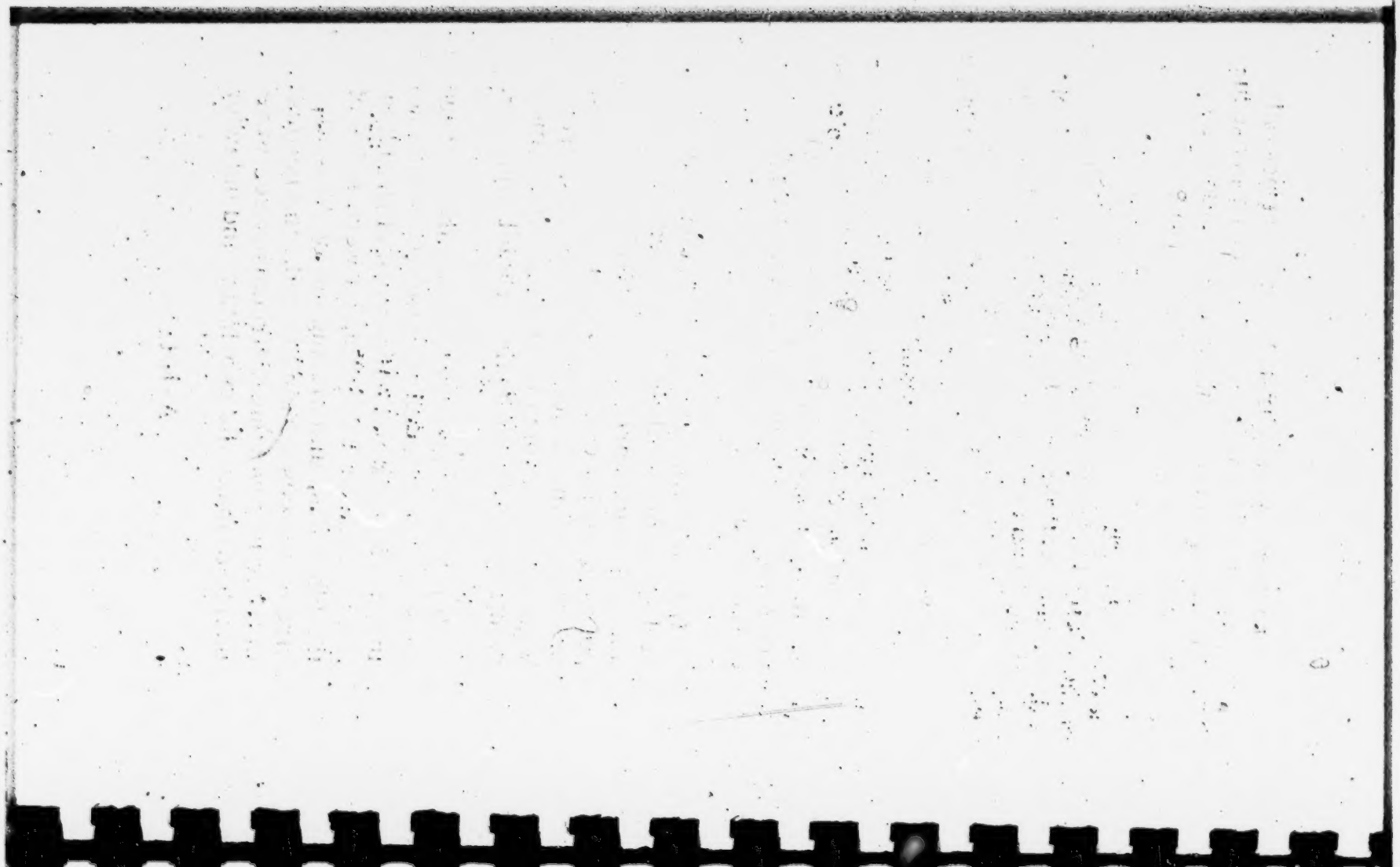
guaranteed by the First Amendment not only of the Plaintiffs who would in fact be prosecuted, but upon the rights of every member of the classes who are parties hereto and represented by Plaintiffs.

37. The same chilling effects on First Amendment rights will result from trials of Plaintiffs even though they may be ultimately acquitted. Every day that the said charges remain pending against Plaintiffs, irreparable injury is being done the Plaintiffs in that:

(a) Plaintiffs are deterred by fear of possible initial conviction of these charges, or of the filing of additional charges, from vigorously pursuing their lawful activities as described above.

(b) Plaintiffs who were not charged with violations of the above-described statutes and ordinances are deterred by fear of possible initial convictions on these charges, or of the filing of additional charges, from vigorously pursuing their First Amendment rights to speak out against racial injustice.

(c) Numerous persons, members of the various sub-classes of Plaintiffs named herein, and friends and supporters of the Plaintiffs have been arrested, as were some of the Plaintiffs, and arising out of the same circumstances herein alleged, and because of their impoverished circumstances were unable to make the exorbitant and unlawful



bail. Accordinly, to achieve their liberty and to obtain relief from unlawful detention, they were required to accede to offers, submitted by the Defendants to plead guilty to the charges or face probable conviction and further detention.

(d) Certain Plaintiffs who were able to make excessive bail, were thereby deprived of funds and property without due process of law.

(e) Certain Plaintiffs, not being able to make exorbitant and unlawful bail were thereby deprived of the right to adequate and competent counsel; the right to secure the presence of witnesses for their trials and the opportunity to prepare an adequate defense.

(f) Members of this class who were not charged with any violations of statutes or ordinances are deterred by fear of possible charges being placed against them for seeking to peacefully exercise their said First Amendment rights.

38. Accordingly, unless this Court restrains the operation and enforcement of these void, invalid, and unconstitutional state statutes, laws and city ordinances, plaintiffs, and members, friends and supporters will continue to suffer the most serious, immediate and irreparable injury in that they will continue to be deterred, intimidated, hindered and prevented from exercising their most elementary and fundamental federal constitutional rights.

39. Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs pray for the following relief:

1. That pursuant to Title 28 U.S.C., 2281 and 2284, a three-judge Federal District Court be immediately convened to hear and determine this proceeding.

2. That a permanent injunction issue without bond; and that bond be expressly waived,

(a) restraining the defendants, their agents and attorneys from the enforcement, operation or execution of any of the statutes of the State of Illinois, and ordinances of the City of Chicago complained of herein.

(b) restraining the Defendants, their agents, and attorneys from impeding, intimidating, hindering, and preventing plaintiffs or members, friends and supporters of ACT from exercising the rights, privileges and immunities guaranteed to them by the Constitution and laws of the United States;

(c) restraining the Defendants, their agents, and attorneys from setting unreasonable and exorbitant bail.

3. That a declaratory judgment issue declaring that Ill. Rev. Stats., Ch. 38, sec. 25-1(a)(1)(2) and (3); Ch. 38, sec. 31-1; Ch. 38, sec. 12-2; 12-4 and 12-6; and Ch. 193-1

and Ch. 11-33 of the ordinances of the City of Chicago, are void on their face, null and void as violative of the Constitution of the United States, and/or as applied to the conduct of the plaintiffs herein.

4. That, pending the hearing and determination of the prayers for permanent relief, an interlocutory injunction issue restraining the Defendants, their agents, attorneys and all others acting in concert with them from enforcing in any way the provisions of the statutes and ordinances set forth in 3 above; or from instituting or undertaking any proceedings whatsoever pursuant to said statutes and ordinances against the plaintiffs, their memembers, friends and supporters, herein.

5. For any and all other relief which this Court may see fit to grant. Plaintiffs respectfully pray that the above relief be granted.

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236-8624

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Arthur Kinoy
511 Fifth Avenue
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212-MU 2-8317

IN THE UNITED STATES DISTRICT COURT

(Title Omitted)

MOTION TO STRIKE AND DISMISS; AND IN OPPOSITION TO THE ENTERING OF A TEMPORARY INJUNCTION AND THE CONVENING OF A THREE JUDGE COURT

Now come certain defendants, John S. Boyle, Chief Judge of the Circuit Court of Cook County, Illinois; John J. Stamos, State's Attorney of Cook County, Illinois; Joseph I. Woods, Sheriff of Cook County, Illinois; Maurice W. Lee, Magistrate, Circuit Court of Cook County, Illinois; and John J. Limperis, Magistrate, Circuit Court of Cook County, Illinois; by their attorney John J. Stamos, State's Attorney of Cook County, Illinois, and respectfully move this Court to Strike and dismiss the above entitled cause and to deny plaintiff's' Motion for a Temporary Injunction and the Convening of a Three Judge Court for the following reasons:

1. This Court has no jurisdiction over the matters presented.

2. As to those plaintiffs who are involved in pending criminal proceedings in the courts of the State of Illinois, this Court is barred from entering an injunction against the defendants by Title 28, Sec. 2283, U.S. Code. Such provision is applicable to stay State Court

proceedings only when (a) an act of Congress so determines; (b) in aid of the federal court's jurisdiction, or (c) when a federal court judgment or decree is to be protected, none of which exceptions are here applicable.

3. As to those plaintiffs not involved in pending criminal cases in the State of Illinois, the allegations of the complaint do not state a claim upon which relief can be granted in this Court.

4. As regards all plaintiffs in the above entitled cause, no claim is presented upon which relief can be granted in this Court.

5. That the complaint states insufficient allegations under Title 42, Secs. 1981, 1983 and 1985 to grant relief to plaintiffs.

6. The doctrine of abstention is applicable and should be utilized in this proceeding to allow the State courts of Illinois maximum responsibility in the areas particularly within their competence.

7. The provisions of Title 42, Sec. 1985 have not been sufficiently pleaded by plaintiffs to allege the necessary prerequisites of a conspiracy to deny plaintiffs' equal protection under the laws.

8. The allegations of plaintiffs' complaint do not sufficiently show or justify irreparable injury, should this Court abstain and allow the State courts of Illinois to

fully determine the issues set forth in said complaint.

9. The defendants contend that plaintiffs have an adequate remedy at law. Specifically, the claim raised herein can be asserted in the State Court proceeding now pending and the Courts of the State of Illinois under the Supremacy Clause of the federal constitution are duly bound to adjudicate those alleged constitutional assertions.

10. Insofar as the application of the challenged criminal statutes of the State of Illinois, as well as the criminal statute of any state, may impinge upon the Federal Amendment rights of any plaintiff already arrested as well as those not presently subjected to criminal proceedings, these are matters which constitute a defense to a criminal action and properly should be brought in the state court proceeding unless this Court is prepared to conduct actual trials in each instance on the state issues.

11. With reference to those purported claims raised by plaintiffs involving the 4th, 5th, 6th, 8th, 9th, 10th, 13th, and 15th Amendments to the United States Constitution plaintiffs make no specific allegation of facts as to the applicability of these Amendments to their purported claim or fail to demonstrate the manner in which said Amendments apply to allegedly void the particular statutes on their face.

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12. As regards plaintiffs' claim that these statutes in question are unconstitutional on its face in that they purportedly violate plaintiffs' due process of law, relating to vagueness and indefiniteness, defendants state that these statutes in question are valid regulations and precise, narrowly drawn regulatory statutes which prescribe certain specific behavior and prohibit a particular type of conduct; as to plaintiffs' claim that such statutes on due process grounds, are unconstitutional as they are applied, this claim is premature in that the State Courts of Illinois, in which certain of these matters are pending, have not yet ruled as to the precise applicability of these statutes as to plaintiffs. As to those plaintiffs without matters pending in the State Court, there are no facts alleged showing a threatened state application of these statutes to those plaintiffs.

13. As regards plaintiffs' claim that the statutes in question are unconstitutional on its face in that they purportedly violate plaintiff's First Amendment rights, defendants state that the statutes in question are valid regulations and precise, narrowly drawn regulatory statutes which prescribe certain specific behavior and prohibit a particular type of conduct; as to plaintiffs' claim that such statutes, on first amendment grounds, are unconstitutional as they are applied, this claim is premature in that the State Courts of Illinois in which certain of these matters are pending, have not ruled as to precise applicability of these statutes as to plaintiffs

who have pending proceedings; as to those plaintiffs without matters pending in the State Court, there are no facts alleged showing a threatened state application to these statutes to those plaintiffs.

John J. Stamos,
State's Attorney of Cook County, Illinois,

Attorney for certain defendants.

By: Edward J. Hladis,
Chief of Civil Division.

Ronald Butler,
Dean H. Bilton,
Assistant State's Attorneys.

State of Illinois,
County of Cook ss.

Ronald Butler, Assistant State's Attorney of Cook County, Illinois, counsel for certain defendants herein, being first duly sworn on oath deposes and says that he has read the Motion to Dismiss the foregoing case subscribed by him; that the same is not interposed for delay, and in his opinion, well founded in point of law.

Ronald Butler

Subscribed and Sworn to before me this 9th day of November, A. D. 1967.

Marion Boyd, Notary Public

IN THE UNITED STATES DISTRICT COURT

(Title Omitted)

PLAINTIFFS' ANSWER TO DEFENDANTS' PENDING MOTIONS TO STRIKE AND DISMISS COMPLAINT

Now come plaintiffs by and through Robert L. Tucker, one of their attorneys, answering Defendants' pending motions to strike and dismiss the complaint, and respectfully stating and showing unto the Court:

1. Both motions, heretofore filed by Defendants purport to extend the initial hearing, now scheduled for December 8, 1967, beyond the legitimate and proper scope of inquiry by the single Judge of the United States District Court; and raise both procedural and substantive questions that may be decided only by the Three Judge District Court requested by Plaintiffs.

2. Defendants' motions go far beyond the question of whether the complaint raises a substantial constitutional question, or whether the complaint at least formally alleges a basis for equitable relief, or otherwise comes within the requirements of the Three Judge Court Statute; which, upon preliminary inquiry, are the only proper questions that may be determined by the United States District Court Judge sitting alone. All other questions raised

in Defendants' motions must be decided, if decided at all, after the statutory Three Judge Court has been convened.

3. The complaint filed by Plaintiffs meets all jurisdictional requirements of the United States District Court; the complaint raises a substantial constitutional question not heretofore foreclosed by any determination of the Supreme Court of the United States; the complaint challenges the constitutionality of state statutes, as well as an ordinance of the City of Chicago, and otherwise requests relief which can neither be granted nor denied except by a statutory Three Judge Court of the United States District Court.

WHEREFORE, Plaintiffs respectfully move the Court to deny Defendants' motions to strike and dismiss the complaint; to promptly certify to the Chief Judge of the United States Seventh Circuit, the necessity for convening a statutory Three Judge Court pursuant to notice as required by law, and to set this cause for hearing on a date certain.

Robert L. Tucker
30 North LaSalle Street
Chicago, Illinois 60602
236-8624
One of the attorneys
for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

(Title Omitted)

OPINION

This is a class action, brought by the plaintiffs pursuant to Rule 23(a)(1)(3) of the Federal Rules of Civil Procedure on their own behalf and on behalf of all others similarly situated, seeking declaratory and injunctive relief. Some of the individual plaintiffs are negro citizens who currently face criminal prosecution before the Circuit Court of Cook County, Illinois. These prosecutions arose out of a series of demonstrations taking place in Chicago, Illinois. Plaintiff, ACT, is an unincorporated association, maintaining offices in Chicago, Illinois, among the purposes of which is to secure negro citizens their federal rights and to end all forms of racial segregation and discrimination. To obtain these objectives, it engages in a variety of protest activities, including picketing, demonstrations, rallies, mass meetings, voter registration drives, community organization and publication. Plaintiffs, Lawrence Landry, Robert Lucas, Robert Brown and Michael Rogers are negroes and sue as representatives of the class of all negroes in the City of Chicago. Defendants are either officers of the City of Chicago, Illinois, or officers of the State of Illinois.

It is asserted that the jurisdiction of the Court over the Complaint arises under Title 28, U.S.C., Sections 1331, 1332, 1343(3), (4), 2201, 2202, 2281 and 2284; Title 42 U.S.C., Sections 1981, 1983 and 1985; and the Constitution of the United States, particularly, the First, Fourth, Fifth, Sixth, Eighth, Tenth, Thirteenth, Fourteenth and Fifteenth Amendments thereto.

The complaint alleges that the defendants have purposefully entered into a plan or scheme of concerted and joint action among themselves and with other persons unknown to the plaintiffs to deprive the plaintiffs of rights, privileges and immunities secured to them by the Constitution and laws of the United States. Pursuant to this plan, the defendants have allegedly prosecuted and threatened to prosecute the plaintiffs and other members of the class they represent under color and authority of certain statutes of the state of Illinois and certain ordinances of the city of Chicago. It is alleged that certain plaintiffs and those they represent have been arrested without any warrants of any kind or probable cause while peacefully demonstrating, that prosecutions based on these statutes and ordinances have instituted against these plaintiffs, and that they have been held on unreasonable and exorbitant bail. The complaint asserts that these arrests and prosecutions, as well as threats of future enforcement of the statutes and ordinances, have not been made by defendants with any

expectation of securing valid convictions, but rather are part of a plan to employ arrest, detention on excessive bail and threats of prosecution to harass plaintiffs and their supporters and discourage them from asserting and exercising their federal rights.

The complaint also alleges that the state statutes and city ordinances under which this plan or scheme has been effectuated are unconstitutional on their face.[1] It is contended that these statutes and ordinances are vague and indefinite; they permit a construction which would violate plaintiffs' First Amendment guarantees as well as due process of law.

It is asserted that the impact of the plan allegedly conceived and implemented by the

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1. The state statutes in question are: Ill. Rev. Stat., Ch. 38, § 25-1 (Proscribing "Mob Violence"); Ill. Rev. Stat., Ch. 38, § 31-1 (Proscribing "Resisting or Obstructing a Peace Officer"); Ill. Rev. Stat., Ch. 38, § 12-2 (Proscribing "Aggravated Assault"); Ill. Rev. Stat., Ch. 38, § 12-4(a)(5) (Proscribing "Aggravated Battery"); Ill. Rev. Stat., Ch. 38, § 12-6(a)(6) (Proscribing "Intimidation").

The city ordinances in question are: Municipal Code of Chicago, Ch. 11, § 33 (Proscribing "Obstructing or Resisting a Police Officer"); Municipal Code of Chicago, Ch. 193, § 1 (Proscribing "Disorderly Conduct").

defendants and the possibility of prosecution under these statutes and ordinances is to discourage and inhibit the lawful exercise by the plaintiffs and the class which they represent of freedom of expression, freedom of assembly, and the right to petition government for redress of grievances.

On the basis of these allegations, the plaintiffs seek: (1) the issuance of declaratory judgments declaring that the state statutes and city ordinances in question are void on their face, null and void as violative of the Constitution of the United States, and/or as applied to the conduct of the plaintiffs herein, (2) the issuance of a permanent injunction restraining the defendants, their agents, and attorneys from the enforcement, operation, or execution of any of these statutes and ordinances, and (3) the issuance of a permanent injunction restraining the defendants, their agents, and attorneys from impeding, intimidating, hindering, and preventing plaintiffs, or members and supporters of ACT from exercising the rights, privileges, and immunities guaranteed to them by the Constitution and laws of the United States. The plaintiffs also move that a three-judge court be convened pursuant to Section 2281 and 2284, Title 28, of the United States Code to hear and determine the issues presented herein. Pending a hearing and determination by a three-judge court, plaintiffs seek the issuance of a temporary injunction restraining the defendants, their agents, attorneys

and all others acting in concert with them from enforcing in any way the provisions of the statutes and ordinances in question or from instituting or undertaking any proceedings whatsoever pursuant to these statutes and ordinances.[2]

Pursuant to Rule 12 of the Federal Rules of Civil Procedure, both the state and city defendants have moved to dismiss this action. Defendants present omnibus motions. They assert, inter alia, the following grounds: (1) this Court has no jurisdiction over the matters presented; (2) the complaint states insufficient allegations to grant relief to plaintiffs; (3) the complaint fails to state a claim upon which relief can be granted; (4) the complaint does not disclose irreparable injury or harm of such a nature as to justify equitable relief; (5) the plaintiffs have an adequate remedy at law since their constitutional claims may be asserted in the proceedings now pending in the state courts; (6) the doctrine of federal abstention is applicable and should be utilized in this

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2. Pending further action by this court or a three-judge court, the defendants have informally agreed, and the plaintiffs have accepted this agreement, that all pending prosecutions for acts of plaintiffs prior to the filing of this suit will be held in status quo.

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proceeding to allow the state courts of Illinois an opportunity to adjudicate the areas within their particular competence; (7) this Court is barred by Title 28, United States Code, Section 2283, from entering an injunction against the defendants in regard to those criminal proceedings currently pending in the Illinois state courts, and (8) the complaint makes no specific factual allegations as to the applicability of the Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Thirteenth and Fifteenth Amendments and fails to demonstrate the manner in which these amendments apply so as to void the statutes and ordinances in question.

The Scope of the Present Inquiry

The plaintiffs seek to have a three-judge court convened pursuant to Sections 2281 and 2284, Title 28, of the United States Code to determine the constitutional questions raised in the complaint. Section 2281 provides as follows:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute . . . shall not be granted by any district court or judge thereof upon the ground of the unconstitu-

tionality of such statute unless the application therefor is heard and determined by a district court of three judges under § 2284 of this Title.

The purpose of this section is to provide procedural protection against the improvident invalidation of state legislation by a single federal judge.[3] It assures the collective judgment of three federal judges whenever a plaintiff seeks to enjoin a state regulatory scheme upon constitutional grounds. Concomitant to this collective judgment is the provision of a direct appeal to the Supreme Court.[4] Accordingly, whenever an application for such relief is addressed to a district court, a single judge's inquiry is limited to whether it is appropriate to convene a three-judge court.

The rule established by the early cases dealing with the powers of a single judge when

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3. Moody v. Flowers, 387 U.S. 97, 100 (1967); Bartlett & Co. v. State Corp. Commission of Kansas, 223 F. Supp. 975, 978 (Kan. 1963); Voege v. American Sumatra Tobacco Corp., 192 F. Supp. 689, 691 (Del. (1961).

4. See U.S. C., § 1253.

such injunctive relief was sought was that a single judge could not dismiss such an action on the merits.[5] This doctrine was qualified, however, by the Supreme Court in the case of Ex parte Poresky, 290 U.S. 30 (1934), where it was held that a single judge could dismiss the action for want of jurisdiction and that such jurisdiction was lacking if the federal constitutional claim was insubstantial.[6] Although it was recognized in Poresky that a single judge could examine the substance of a constitutional question before the conventing of a three-judge court, the earlier rule has continued to have its influence. Title 28, United States Code, Section 2284(5), currently

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5. See Ex parte Northern Pacific R.R. Co., 280 U.S. 142 (1929); Ex parte Metropolitan Water Co. of West Virginia, 220 U.S. 539 (1911); Wright, Federal Courts § 50, at 165 (1963).

6. Noted in 47 Harv. L. Rev. 707; 28 Ill. L. Rev. 839 (1934); 18 Minn. L. Rev. 729. A constitutional claim was deemed insubstantial if it was obviously without merit or if its unsoundness was demonstrated by previous decisions of the Supreme Court. California Water Service Co. v. City of Redding, 304 U.S. 252, 255 (1939).

provides that a single judge "shall not ... dismiss the action or enter a summary or final judgment." This language was added to the three-judge court act in 1942[7] and would seem to suggest a codification of the earlier rule.[8] Nevertheless, decisions subsequent to this amendment to the act indicate that while a single judge's authority is circumscribed, it is not so limited as this language would seem to suggest.[9]

The most recent Supreme Court decision involving this question is Idlewild Bon Voyage

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7. Act of April 6, 1942, c. 210, 56 Stat. 199.

8. Wright, Federal Courts, § 51, at 165-66 (1923); Note, 28 Minn. L. Rev. 131 (1944); Note, 62 Harv. L. Rev. 1398 (1949).

9. See, e.g., Eastern States Petroleum Corp. v. Rogers, 265 F.2d 593 (D.C. Cir.), mandamus denied, 361 U.S. 805 (1959); Carrigan v. Sunland-Tujunga Tel. Co., 263 F.2d 568 (9th Cir. 1959); Klein v. Lee, 254 F.2d 188 (7th Cir. 1958). Although these courts seem to have applied the rule announced in Ex parte Poresky, 290 U.S. 30 (1935), without thoroughly considering the effect of 28 U.S.C., § 2284(5), this course seems to have been approved by the Supreme Court. See Turner v. City of Memphis, 369 U.S. 350, 352-53 (1962); Bailey v. Peterson, 369 U.S. 31 (1962). See, also, Wright, Federal Courts § 51, at 166 (1963).

Liquor Corp. v. Epstein, 370 U.S. 713 (1961). In Idlewild the Court indicated that a single judge's inquiry "is appropriately limited to whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute." Id. at 715. If those criteria are met, it is "impermissible for a single judge to decide the merits of the case, either by granting or by withholding relief." Id. at 715. This would seem to represent the present limits of a single judge's power when an application for a three-judge court is addressed to a district court. See Stamler v. Willis, 371 F.2d 413, 414 (7th Cir. 1966); Pierre v. Jordon, 333 F.2d 951, 957 (10th Cir.), cert. denied, 379 U.S. 974 (1954), rehearing denied 380 U.S. 927 (1965).

It seems clear, therefore, that at the present time this Court does not have the power to dismiss the instant action unless it fails to meet the criteria specified in Idlewild or the general requisites of federal jurisdiction.10

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10. It is clear that a single judge, where a three-judge court is requested, may consider whether the cause comes within the requisite of federal jurisdiction in an appropriate case. See Lion Mfg. Corp. v. Kennedy, 330 F.2d 833 (D.C. Cir. 1964).

The Requisites of Federal Jurisdiction

The plaintiffs seek to invoke the jurisdiction of this Court under a number of jurisdictional statutes. Among them are Sections 1331 and 1343 of Title 28, United States Code, Section 1331 provides that federal courts shall have general original jurisdiction over cases "arising under" the constitution, laws and treaties of the United States, while section 1343 provides that the federal courts shall have original jurisdiction over cases seeking relief for certain specified wrongs.

The plaintiffs' claims are based on the construction and effect of various federal laws and certain Amendments to the Constitution of the United States. This would seem to satisfy any common sense approach to the meaning of the phrase "arising under" in section 1331. See Gully v. First National Bank in Meridian, 299 U.S. 109 (1936). Moreover, the plaintiffs seek redress for wrongs specified in section 1343. Therefore, the jurisdictional requisites for purposes of both sections 1331 and 1343 are satisfied.

Substantial Federal Question

Even though an injunction is requested on the basis of the unconstitutionality of a state statute, a district judge need not convene a three-judge district court if the constitutional question presented in the complaint is

wholly insubstantial.[11] This lack of substantiality might appear either because the constitutional queation is obviously without merit or because its unsoundness is so clearly demonstrated by previous decisions of the Supreme Court as to foreclose the subject.[12]

As previously stated, the complaint alleges that certain state statutes and city ordinances are unconstitutional on their face.[13] Although

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11. E.g., Ex parte Poresky, 290 U.S. 30 (1934); Powell v. Workman's Compensation Bd. of State of New York, 327 F.2d 131, 138 (2d Cir. 1964); Benoit v. Gardner, 241 F. Supp. 206, 207 (Mass. 1965); United States ex rel. Horne v. Pennsylvania Bd. of Parole, 234 F. Supp. 368, 370 (E.D. Pa. 1964).

12. E.g., California Water Service Co. v. City of Redding, 304 U.S. 252, 255 (1938); German v. South Carolina State Ports Authority, 295 F.2d 491, 494 (4th Cir. 1961); Ford v. Attorney General of Pennsylvania, 184 F. Supp. 129 (E.D. Pa.), affirmed, 364 U.S. 291 (1960).

13. See notes 1 and 2, supra, and accompanying text.

the defendants have cited decisions by the Supreme Court of Illinois upholding the constitutionality of some of the challenged statutes and ordinances, these decisions alone would not foreclose an examination of the constitutionality of these statutes and ordinances. Moreover, the complaint also alleges that the statutes and ordinances in question have been unconstitutionally applied to the plaintiffs as part of a plan or scheme to deprive them of their constitutional rights. When viewed in this context, it is difficult to see how the constitutional questions raised can be deemed insubstantial.

Basis for Equitable Relief

A three-judge court is to be invoked under section 2281 only where the complaint seeks injunctive relief. Before a federal court will assume equitable jurisdiction, however, the groundwork for such relief must be established. The plaintiff must show that there is an absence of a plain and adequate remedy at law and that the enforcement of the statute will cause him irreparable harm and injury. The defendants contend that these requisites do not exist in the instant actions. They assert that plaintiffs are afforded an adequate remedy at law through the adjudication of their claims in the state courts and that the mere possibility of an erroneous application of constitutional standards by those courts does not amount to irreparable injury.

Although in the landmark case of Ex parte Young, 209 U.S. 123 (1908), the Supreme Court recognized that federal injunctions would be justified where state officers "threaten and are about to commence proceedings either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution,"[14] the general requisites for equitable relief have usually been rigorously required by the federal courts in such situations. The application of these limitations has usually been compelled by considerations of federalism. It has been generally assumed that state courts and prosecutors will observe constitutional limitations and exercise their power in good faith. Accordingly, federal interference with the enforcement of state laws has been deemed inconsistent with our federal framework. The normal adjudication of constitutional defenses has been considered to afford parties an adequate remedy at law, and the mere possibility of an erroneous initial application of constitutional standards has not usually been considered to amount to the irreparable injury necessary to justify invocation of equitable relief.[15]

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14. 209 U.S. at 156.

15. See, e.g., Cleary v. Bolger, 371 U.S. 392 (1963); Douglas v. City of Jeannett, 319 U.S. 157, 161-65 (1943); Beal v. Missouri Pacific R.R. Corp., 312 U.S. 45, 49-51 (1941); Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 95-97 (1935).

The application of these traditional limitations was qualified by the Supreme Court in Dombrowski v. Pfister, 380 U.S. 479 (1965). The complaint involved in Dombrowski sought declaratory relief and an injunction restraining the defendants (state officials) from enforcement of certain alleged unconstitutional Louisiana anti-subversive statutes. It asserted two distinct grounds for federal relief. First, it alleged that the defendants had invoked, and threatened to continue to invoke, criminal process upon the statutes without any hope of ultimate success, but solely to discourage the plaintiffs' civil rights activities. Second, it alleged that the Louisiana statutes were unconstitutionally broad and vague regulations of expression. A three-judge court dismissed the complaint, reasoning that the case did not present a question of threatened irreparable injury to federal rights and that constitutional defenses could be adequately presented in the normal state adjudicatory process.[16]

On appeal, the Supreme Court reversed, stating,

> /t/he allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure ad-

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16. Dombrowski v. Pfister, 227 F. Supp. 556, 562-63 (E. D. La. 1964).

> equate vindication of constitutional rights. They suggest that a substantial loss or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury. 380 U.S. at 485-86.

The complaint in the instant action is substantially similar to the one in Dombrowski. It alleges two bases for relief: (1) a planned misuse of statutes and ordinances regulating expression by the defendants, and (2) the statutes themselves are unconstitutionally vague and indefinite regulations of expression. The Dombrowski case seems to indicate that either of these grounds will support equitable relief.[17]

The complaint, obviously, alleges a formal basis for equitable relief. Thus, it would seem appropriate to convene a three-judge court to determine the constitutionality of the challenged state statutes.

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17. See 380 U.S. at 485-87. See, also, Carmichael v. Allen, 267 F. Supp. 985 (N. D. Ga. 1967); Cameron v. Johnson, 262 F. Supp. 873, 878 (S. D. Miss. 1966).

The defendants also contend that this court is barred by section 2283 of Title 28, United States Code, from enjoining any prosecutions against plaintiffs under the statutes and ordinances attacked in this action which are currently pending in the state courts of Illinois.[18]

This question is premature. Section 2283 is not a jurisdictional statute. It is essentially a rule of comity and its demand is directed to the discretion of the federal court.[19] The scope of the present inquiry is limited to whether it is appropriate to convene a three-judge court. This question, therefore, should be reserved for later determination if it becomes relevant.

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18. Section 2283 provides:

> A Court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

19. E.g., Baines v. City of Danville, 337 F.2d 579, 593 (4th Cir. 1964); Petroleum Corp. v. Harper, 273 F.2d 715, 718-19 (5th Cir. 1960); Cameron v. Johnson, 262 F. Supp. 873, 886-87 (S.D. Miss. 1966); Feldman v. Pennroad Corp., 60 F. Supp. 716 (Del. 1945), aff'd. '55 F.2d 733 (3d Cir. 1946), cert. denied 329 U.S. 808 (1947).

Otherwise Appropriate for a Three-Judge Court

Section 2281, Title 28, United States Code, provides for a three-judge court when the enforcement of a "state-statute" is sought to be enjoined. The Supreme Court has consistently construed this action to encompass only statues of general and statewide application.[20] The term "statute" does not include city ordinances, local resolutions, or state statues having only a local application. Similarly, the officer sought to be enjoined must be a state officer. A three-judge court need not be convened where the action seeks to enjoin a local official who is performing acts of purely local concern.[21] It has been held, however, that section 2281 does apply to local officers performing a state function which embodies a policy of statewide concern.[22]

The instant action poses constitutional challenges to both state statute and local ordinances, and seeks to enjoin both state and local officials. The respective challenges to these state statu-

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20. See, e.g., Moody v. Flowers, 387 U.S. 97 (1966); Griffin v. School Board, 377 U.S. 218, 227-28 (1963); Rorick v. Board of Commissioners, 307 U.S. 208 (1939); Ex parte Collins, 277 U.S. 565 (1928).

21. See, e.g., Moody v. Flowers, 387 U.S. 97, 101 (1966); Rorick v. Board of Commissioners, 307 U.S. 208 (1939); Ex parte Collins, 277 U.S. 565, 568 (1928).

22. Spielman Motor Sales Co. v. Dodge,

tes and city ordinances present common questions of fact as to whether they are part and parcel of a scheme to deprive the plaintiffs of their federal rights. While a joinder of these claims is permissible under the federal rules of civil procedure,[23] their joinder is inappropriate for purposes of a three-judge court. The state statutes have a statewide applicability. The city ordinances have only a localized applicability. The attack upon the state statutes and the issuance of an injunction against state and local officials charged with their enforcement present issues within the ambit of a three-judge court. The attacks upon the city ordinances and the issuance of an injunction against those charged with their enforcement, present issues which may be properly tried by only a single judge.

The Supreme Court has consistently maintained the view that if a state statute is attacked on substantial federal constitutional grounds as well, a three-judge court is required and has jurisdiction over all the claims raised against the statute.[24] In contrast, however, where a

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23. See F. R. Civ. Pro. 18(a), 20(a).

24. Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73 (1960); Parker v. Brown, 317 U.S. 341 (1943); Sterling v. Constantin, 287 U.S. 378, 393 (1932); Louisville & Nashville R. R. Co. v. Garrett, 231 U. S. 298 (1913).

party joins a claim which is appropriate for a three-judge court with an independent claim properly triable before a single judge, the Supreme Court has held that the three-judge court lacks jurisdiction over the independent claim.[25]

This Court concludes, therefore, that the claims regarding the constitutionality of the challenged state statutes should be severed from those involving the municipal ordinances. A three-judge court should be convened to consider the former claims, while the latter shall be tried separately by a single judge.

Abstention

The defendants assert that federal abstention is applicable to the instant proceeding and should be utilized to allow the state courts an opportunity to adjudicate the areas within their particular competence.

It is true that the doctrine of federal abstention has been applied in situations which are analogous to this.[26] The application of this

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25. Powell v. United States, 300 U.S. 276 289-90 (1932); New York Central Securities Corp. v. United States, 287 U.S. 12 (1932); Pittsburgh & West Virginia Ry. Co. v. United States, 281 U.S. 479, 488 (1930).

26. See, e.g., Cleary v. Bolger, 371 U.S. 392 (1962); Pugach v. Dollinger, 365 U.S. 458

doctrine has been based on deference to the interest and sovereignty of the states and on the reluctance of the federal courts to adjudicate constitutional questions permaturely when state courts might adopt a statutory construction which would avoid or modify the constitutional issues.[27] Recent authorities, however, indicate the doctrine may not be applicable in situations such as is depicted in instant complaint.[28]

Nevertheless, it is unnecessary to decide this question at the present time. The doctrine of abstention does not go to the jurisdiction of the court; it is essentially a matter of discretion. This question is beyond the scope of the present inquiry, i.e., the appropriateness of a three-judge proceeding to consider the constitutionality of the challenged state statutes and, therefore, the question of abstention is premature.

For the foregoing reasons, defendants' motions to dismiss are denied. A three-judge court will be convened to consider the constitutionality of the challenged state statutes.

(1960); affirming 277 F.2d 739 (5th Cir.); Douglas v. City of Jeannett, 319 U.S. 157 (1942).

27. See cases note 26, supra.

28. See Dombrowski v. Pfister, 380 U.S. 479 (1965); Zwickler v. Koota, 36 L. W. 4041 (1967); Carmichael v. Allen, 267 U.S. 985 (1967).

The issue of the alleged unconstitutional application of the state statutes by the defendants to the plaintiffs will be held in abeyance pending a determination of the threshold question of constitutionality. Similarly, the question of the constitutionality of the challenged ordinances will be considered initially by the Court and the issue of the alleged unconstitutional application thereof to plaintiffs held in abeyance. Appropriate orders will be entered.

Hubert L. Will,

United States District Judge.

Dated: December 28, 1967.

IN THE UNITED STATES DISTRICT COURT

(Title Omitted)

ANSWER

The defendants, John S. Boyle, Chief Judge of the Circuit Court of Cook County, Illinois; John J. Stamos, State's Attorney of Cook County, Illinois; Joseph I. Woods, Sheriff of Cook County, Illinois; Maurice W. Lee, Magistrate of the Circuit Court of Cook County, Illinois, and John J. Limperis, Magistrate of the Circuit Court of Cook County, Illinois, respectfully allege:

1. They admit the allegations of Paragraph 1.

2. They admit the allegations of Paragraph 2 insofar as they are applicable to these defendants and further aver that the criminal prosecutions for the violation of the Illinois Statutes in question were initiated at least two months prior to the commencement of this action and are still pending in the Criminal Division of the Circuit Court of Cook County, Illinois.

3. They admit the allegations of Paragraph 3 insofar as they are applicable to these defendants and further aver that the criminal prosecutions for the violation of the Illinois Statutes in question were initiated at least two months prior to the commencement of this action and are still pending in the Criminal Division of the Circuit Court of Cook County, Illinois.

4. They admit the allegations of Paragraph 4 insofar as they are applicable to these defendants and further aver that the criminal prosecutions for the violation of the Illinois Statutes in question were initiated at least two months prior to the commencement of this action and are still pending in the Criminal Division of the Circuit Court of Cook County, Illinois.

5. They admit the allegations of Paragraph 5 insofar as they are applicable to these defendants and further aver that the criminal prosecutions for the violation of the Illinois Statutes in question were initiated at least two months prior to the commencement of this action and are still pending in the Criminal Division of the Circuit Court of Cook County, Illinois. Defendants further aver that the subclass of plaintiffs in Paragraph 5 of the Complaint prosecuted a petition for removal from the State Court to the U.S. District Court for the Northern District of Illinois on September 11, 1967, the cause being entitled Brown, et al. v. People of the State of Illinois and City of Chicago, 67 C 1557.

6. They admit the allegations of Paragraph 6 of the Complaint insofar as they apply to these defendants except insofar as the date of arrest. Plaintiff, Frank Ditto, was arrested on August 4, 1966. Defendants further aver that the criminal prosecutions for the violation of the Illinois Statutes in question were initiated in August 1966 and are still pending in the Criminal Division of the Circuit Court of Cook County, Illinois.

7. They neither admit nor deny the allegations of Paragraph 7 and demand strict proof thereof.

8. They deny the allegations of Paragraph 8.

9. They deny the allegations of Paragraph 9.

10. They admit the allegations of Paragraph 10.

11. They admit the allegations of Paragraph 11.

12. They admit the allegations of Paragraph 12 except that they deny that said defendant is a representative of the class of Judges of the Circuit Court of Cook County, Illinois.

13. They admit the allegations of Paragraph 13.

14. They admit the allegations of Paragraph 14.

15. They admit the allegations of Paragraph 15.

16. They admit the allegations of Paragraph 16.

17. They admit the allegations of Para-

graph 17 except that they deny that said defendant is a representative of the class of Magistrates of the Circuit Court of Cook County, Illinois.

18. They admit the allegations of Paragraph 18 except that they deny that said defendant is a representative of the class of Magistrates of the Circuit Court of Cook County, Illinois.

19. They admit the allegations of Paragraph 19 except that they deny that said defendants are representatives of the class of Police Officers of the City of Chicago.

20. They deny the allegations of Paragraph 20.

21. They deny the allegations of Paragraph 21, and all sub-parts thereof.

22. They deny the allegations of Paragraph 22 in that a substantial federal question has not been presented.

23. They deny the allegations of Paragraph 23.

24. They deny the allegations of Paragraph 24.

25. They deny the allegations of Paragraph 25.

26. They deny the allegations of Paragraph 26.

27. They deny the allegations of Paragraph 27.

28. They deny the allegations of Paragraph 28.

29. They deny the allegations of Paragraph 29.

30. They deny the allegations of Paragraph 30.

31. They deny the allegations of Paragraph 31.

32. They deny the allegations of Paragraph 32.

33. They deny the allegations of Paragraph 33.

34. They deny the allegations of Paragraph 34.

35. They deny the allegations of Paragraph 35.

36. They deny the allegations of Paragraph 36.

37. They deny the allegations of Paragraph 37.

38. They deny the allegations of Paragraph 38.

39. They deny the allegations of Paragraph 39.

Affirmative Defenses

1. This Court lacks jurisdiction of the subject matter.

2. The Complaint fails to state a claim upon which relief can be granted.

3. Insofar as the Complaint seeks to enjoin the pending prosecutions in the Criminal Division of the Circuit Court of Cook County, Illinois, such requested relief is expressly prohibited by the provisions of 28 U.S.C. 2283.

4. Insofar as the plaintiff seeking injunctive relief against the pending criminal prosecutions in the Criminal Division of the Circuit Court of Cook County, Illinois, they have an adequate remedy at law. Under Illinois law and procedure these same claims can be asserted in the criminal proceedings commenced before the filing of this suit and now pending in the Criminal Division of the Circuit Court of Cook County, Illinois.

5. The doctrine of federal abstention should be applied to preclude the discretionary exercise of the jurisdiction of this Court should such jurisdiction be found by this Court to exist.

Wherefore, the defendants respectfully pray that this Complaint be dismissed.

John J. Stamos,
States Attorney of Cook
County, Illinois,

By Edward J. Hladis,
Chief of Civil Division.

Ronald Butler,
Assistant State's Attorney.

State of Illinois)
) SS.
County of Cook)

Ronald Butler hereby certifies that he served a copy of this Answer upon Robert L. Tucker, Esq., by mailing a copy of same, first class mail, postage prepaid, to him at his office, 30 North LaSalle Street, Chicago, Illinois 60602.

Ronald Butler.

PROOF OF SERVICE

Robert L. Tucker, upon duly making oath deposes and says that he caused a true and correct copy of the foregoing Jurisdictional Statement and Appendix to be served, by mailing copy of same, first class mail, postage prepaid to:

John J. Stamos, Esq., State's Attorney of Cook County, Illinois, 500 Chicago Civic Center, Chicago, Illinois 60602

Robert L. Tucker

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

LANDRY *v.* BOYLE, CHIEF JUDGE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 659. Decided December 9, 1968.

PER CURIAM.

The appeal is dismissed for failure to comply with Rule 13 (1).